Supreme Court, U.S.
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No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF BIRMINGHAM, ALABAMA,
Petitioner,
v.
SCOTT THOMAS MORRO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the "policy or custom" limitation on municipal liability under 42 U.S.C. § 1983 a "defense", or is it an element of the cause of action which plaintiff must prove?

2. Can a municipal defendant be said to have waived the "policy or custom" rule of liability by not specifically mentioning it in the Fed. R. Civ. P. 16 pretrial order, as though it were an affirmative defense—or is the issue preserved if the municipality (a) raises the issue in a motion to dismiss; (b) denies, in its answer, the plaintiff's allegation of municipal policy; (c) raises the issue in a motion for summary judgment; (d) denies, in the Fed. R. Civ. P. 16 pretrial order, the plaintiff's allegations (including municipal policy); *and* (e) raises the issue in a motion for judgment as a matter of law under Fed. R. Civ. P. 50?

3. Can a municipality be liable under 42 U.S.C. § 1983 for a disciplinary suspension imposed on an employee by a municipal official, where that suspension was reviewable—and indeed was reviewed and reversed—by a personnel board under state and local law?

LIST OF PARTIES

Petitioner, which was Defendant below, is the City of Birmingham, Alabama. Respondent, who was Plaintiff below, is Scott Thomas Morro. Former Chief of Police Arthur Deutsch was a Defendant in his individual capacity and his official capacity, and Chief of Police Johnnie Johnson was a Defendant in his official capacity; but all claims against them were dismissed and they are therefore not parties in the present posture of the case.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Birmingham, Alabama, respectfully prays that a writ of certiorari issue to review the order and mandate of the United States Court of Appeals for the Eleventh Circuit, *Morro v. City of Birmingham,* 117 F.3d 508 (11th Cir. July 21, 1997), *rehearing and rehearing en banc denied,* —— F.3d —— (11th Cir. September 15, 1997).

OPINIONS BELOW

The July 21, 1997, decision of the United States Court of Appeals for the Eleventh Circuit, reported at 117 F.3d 508 (11th Cir. 1997), is reproduced in Appendix A [1a-22a]. The September 15, 1997, order of the United States Court of Appeals for the Eleventh Circuit denying rehearing and rehearing en banc, reported at —— F.3d ——

(11th Cir. 1997) (table), is reproduced in Appendix C [53a-54a]. The relevant orders of the United States District Court for the Northern District of Alabama are reproduced in Appendix B [23a-52a], including the following orders which are officially or unofficially reported: the March 23, 1995, order and opinion denying Petitioner's second motion for summary judgment, 897 F.Supp. 553, 1995 U.S. Dist. LEXIS 13142 [23a-30a]; the April 12, 1996, order and opinion denying Petitioner's motion for judgment as matter of law, 926 F.Supp. 1033, 1996 U.S. Dist. LEXIS 7403 [31a-51a]; and the April 17, 1996, supplement to that opinion, 1996 U.S. Dist. LEXIS 7404 [51a-52a]. Other relevant parts of the record are reproduced in Appendix D [58a-96a].

JURISDICTION

The panel opinion of the United States Court of Appeals for the Eleventh Circuit was issued on July 21, 1997. Petitioner City of Birmingham timely sought rehearing, or rehearing en banc, which was denied on September 15, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a suit under 42 U.S.C. § 1983 by a police officer, Scott Thomas Morro, against the City of Birmingham ("Petitioner" or "the City"). Morro claimed that his constitutional rights were violated by a disciplinary suspension. Jurisdiction was present in the United States District Court for the Northern District of Alabama under 28 U.S.C. §§ 1331 and 1343.

In the course of affirming a $150,000 judgment against the City, the U.S. Court of Appeals for the Eleventh Circuit noted near-certainty that the imposition of liability on the City violated this Court's repeated holding that municipalities are liable under § 1983 only where the constitutional deprivation was caused by a city "policy" or "custom" which had the force of law. 117 F.3d at 510, 515 [2a, 12a-13a]. *See, e.g., Monell v. Dep't of Social Services,* 436 U.S. 658 (1978); *Pembaur v. City of Cincinnati,* 745 U.S. 469 (1986); *City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988); *Board of County Commissioners of Bryan County v. Brown,* —— U.S. ——, 117 S.Ct. 1382 (1997).[1]

Despite the fact that this verdict was contrary to that precedent, the Court of Appeals upheld the verdict based on the conclusion that the City had waived what the Court

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[1] The Court of Appeals was undoubtedly correct in suggesting that the City would not be liable on a proper application of governing principles of law. The suspension of which Morro complains was reversed by the Jefferson County Personnel Board, which sits in review of such disciplinary suspensions. Thus it cannot by any stretch of the imagination be said that the Police Chief was the "final policymaker" for purposes of that suspension. *See City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988) (disciplining officer was not "final policymaker", and therefore did not give rise to municipal liability, where his decisions were subject to review by a personnel board). Accordingly, the City is not liable; and Question #3 presented by this Petition is therefore included so that, ultimately, this Court could render final judgment in favor of the City rather than remanding.

of Appeals repeatedly called the "*Monell defense* (italics added). *See, e.g.*, 117 F.3d at 515, 516 & n.3 [13a-16a].

The finding of a waiver of the issue was remarkable, as the City had raised the issue repeatedly, literally from the first opportunity. The City's very first filing upon being served with the Complaint was a Motion to Dismiss, in which the City argued (inter alia) that

> The complaint fails to state any official policy, practice, or custom of the City of Birmingham which resulted in a violation of plaintiff's rights protected by the United States Constitution . . . or the laws of the United States . . . *Monell v. New York City Department of Social Services,* 436 U.S. 658; 98 S.Ct. 2018 (1978).

[56a]. The City' motion to dismiss was granted, with the plaintiff given leave to replead.

The amended complaint then alleged, inter alia, that former Chief of Police Deutcsh (who imposed the suspension) was "acting . . . as a policy maker for the City of Birmingham . . ." Amended Complaint ¶ 9[62a]. *See also* ¶¶ 13, 15, 17 (alleging that Deutcsh was "official policy maker of the City") [63a-64a]. The City, in its Answer, denied the material allegations of each of those paragraphs of the Amended Complaint. [69a-70a]. It is notable that the plaintiff did not allege that the City was liable pursuant to the "custom" avenue of municipal liability, but merely alleged that the City was liable on the theory that Deutcsh was the "policymaker" for the City with regard to the acts at issue.

The City later moved for summary judgment under Fed. R. Civ. P. 56, arguing (inter alia) that

> Plaintiff's complaint against Defendant City of Birmingham fails to allege a 'policy or practice' of the City of Birmingham, to violate plaintiff's or others' constitutional rights. . . . The plaintiff's basis for liability against Defendant, City of Birmingham, is

> predicated solely on the doctrine of 'Respondeat Superior'. This may not form the basis for the liability of a municipality under 42 U.S.C. § 1983.

[72a]. This was obviously an invocation of the *Monell* limitation on municipal liability, as the District Court recognized. *See* March 23, 1995, order and opinion denying Petitioner's second motion for summary judgment, 897 F.Supp. at 556, 1995 U.S. Dist. LEXIS 13142 *9-*10 [29a] ("The City's earlier denied motion for summary judgment pointed out that Morro had not alleged a policy or practice by the City to similarly violate plaintiff's or others' constitutional rights or that the liability sought to be imposed on the City is predicated on a theory of respondeat superior contrary to the teaching of *Monell v. Dept. of Soc. Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).").

On the same day that Rule 56 motion was filed, a first pretrial order was entered under Fed. R. Civ. P. 16. [75a-78a]. Plaintiff's submission of his position in that order stated (inter alia) that plaintiff adopted the allegations in his complaint, and that "Plaintiff avers that defendant Deutcsh . . . [was] acting . . . as a policy maker for the City of Birmingham." The City, in its position, denied each and every material allegation of the complaint (which, as noted above, included the repeated allegation that Deutcsh was an official policy maker for the City with regard to the suspension). Pretrial Order, April 20, 1993, ¶¶ 6(b), 6(c) [76a-77a].

After a successful appeal by Deutcsh in his individual capacity from the denial of his motion for summary judgment based on qualified immunity (*Morro v. City of Birmingham,* 39 F.3d 325 (11th Cir. 1994) (table)), the case returned to the District Court. A second pretrial order was entered under Fed. R. Civ. P. 16. [79a-82a]. This time, neither party specifically made any mention of the *Monell* "policy" limitation on municipal liability under § 1983; plaintiff adopted the allegations of his com-

plaint, and the City denied those allegations. Pretrial Order, April 5, 1995, ¶¶ 6(b), 6(c) [80a-81a].

As the City had been unsuccessful in seeking judgment in its favor based on the *Monell* issue under Rules 12 and 56, the case proceeded to trial. At that trial, the City moved for judgment as a matter of law under Rule 50(a) based on the "policy" doctrine, citing *Praprotnik*. [Transcript, 83a-90a]. The District Court laid to rest any possible issue of timeliness of that contention, stating "I'm not faulting you for not having articulated it sooner . . . Let's renew or allow you [counsel for the City] to reimpose the 50(a) motion in light of the argument that Chief Deutcsh was not the final decision maker and therefore was not the City of Birmingham." [84a]. However, after a discussion of the merits of the *Monell* issue, the District Court denied the City's Rule 50 motion. [90a].

The City renewed its motion after the verdict was entered, again based (inter alia) on the "policy" doctrine under *Monell*. [91a-96a]. That motion, too, was denied. In denying it, the District Court for the first time faulted the City for the way in which it presented the issue; the District Court held that the City had waived (or was "judicially estopped" from relying on) the *Monell* "policy" issue. [45a].

The Court of Appeals, in affirming, held that the City had waived the issue by allegedly failing to preserve it in the second Rule 16 pretrial order. 117 F.3d at 515-16 [13a-16a].

The City requested rehearing, or rehearing en banc; that request was denied. [53a-54a].

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals, as explained in its decision, was that the City had waived the *Monell* issue by failing to raise it specifically in the second pretrial order entered in this case. As shown in the following

sections, that decision conflicts with precedent from this Court, and conflicts with precedent from other federal Circuits. Accordingly, given the importance of this issue, review by certiorari is warranted.

I. THE DECISION BELOW IS NECESSARILY BASED ON THE VIEW THAT THE *MONELL* "POLICY" LIMITATION ON MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983 IS A DEFENSE RATHER THAN AN ELEMENT OF PLAINTIFF'S CLAIM.

In order to see that the decision below is contrary to relevant decisions of this Court and of other courts, it is first necessary to understand the rationale for the decision below: the Court of Appeals' decision is *necessarily* based on the view that the *Monell* limitation on municipal liability is a *defense* rather than an element of the cause of action which a plaintiff must prove.

The first indication that the Court of Appeals deemed the *Monell* issue to be a defense—rather than an element of plaintiff's claim—is the language used by the Court of Appeals; it made repeated reference to what it called the "*Monell defense*". *See, e.g.*, 117 F.3d at 512 [7a] (noting that the City's initial Fed. R. Civ. P. 50 motion did not rely on "a *Monell* defense"), *id.* at 512 [7a] (stating that "the district court did not respond favorably to the City's belated attempt to raise a *Monell* defense"); *id.* at 513 [8a] (quoting district court's reference to a "*Monell* defense"); *id.* at 515 [13a] (indicating that the City had "failed to identify its potentially available *Monell* defense as an issue at the pretrial conference"); *id.* at 515 [13a] (referring, in section heading 2, to "The City's Failure to Preserve its *Monell* Defense"); *id.* at 516 [15a] (referring to "the final policymaker defense"); *id.* at 516 [15a] (affirming the district court's decision not to "accommodate presentation of the *Monell* defense"); *id.* at 516 n.3 [16a] (referring to the "*Monell* defense"). This choice of words was no accident; it was critical to the reasoning of the Court of Appeals to portray the *Monell* issue as a

defense rather than an element of the plaintiff's cause of action, in order to hold that the City (rather than the plaintiff) had waived the issue by failing to mention it in the second pretrial order.

The second indication that the Court of Appeals deemed the *Monell* issue to be a defense—rather than an element of plaintiff's claim—is that this is the only way to read the Court of Appeals' decision so as to make it consistent with prior circuit precedent regarding the waiver of issues in pretrial orders under Fed. R. Civ. P. 16. That is, Fifth Circuit precedent from those days when Alabama was part of the Fifth Circuit—precedent which was immediately adopted as binding by the Eleventh Circuit upon its creation, *see Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981)—clearly holds that "Nothing in Rule 16 F. R. Civ. P. 16 . . . suggests that a party waives or admits an issue as to which his opponent has the burden of proof by failing to include the issue in his pretrial stipulated list of remaining issues." *Pacific Indemnity Co. v. Broward County,* 465 F.2d 99, 103 (5th Cir. 1972). "To hold . . . that the County waived [an issue] because the County failed to remind [plaintiff] in the pretrial stipulation that [plaintiff] still had to prove [the issue] would strain the logic of our adversarial system and would destroy much of the usefulness of a pretrial order as a device to reduce and limit issues at trial." *Id.* at 104. *See also Ramada Development Co. v. Rauch,* 644 F.2d 1097, 1110-11 (5th Cir. Unit B, 1981) (adhering to *Pacific Indemnity*'s holding on this point). Therefore, in order to have the decision below make any sense under binding Circuit precedent, the decision below *must* be read as holding that the *Monell* limitation on municipal liability under § 1983 is an affirmative defense—i.e., an issue on which the municipality bears the burden of proof —rather than an element of plaintiff's claim.

The third indication that the Court of Appeals deemed the *Monell* issue to be a defense is that this is the only

rationale which would logically give rise to the holding that the City waived the *Monell* issue. That is, the pretrial order on which the Court of Appeals relied—which was the second Rule 16 order in the case—shows that *neither* party made specific mention of the *Monell* issue, but *both* parties in effect adopted the positions stated in their pleadings. Plaintiff stated, "Plaintiff's positions are set forth in detail in the complaint which is adopted as if fully set forth herein." The City, for its part, "den[ied] each and every material allegation of plaintiff's complaint filed in this cause." The Amended Complaint, in turn, contained Plaintiff's allegation that Chief Deutcsh was acting as the City's "policy maker," and the City's Answer denied that allegation. Therefore, where *neither* party made specific reference to *Monell* but *both* parties adopted by reference their previously stated positions on the subject, a finding of waiver by the City is *necessarily* based on the belief that it was the City's, rather than the Plaintiff's, burden to raise the issue. This is particularly so, as the City had already invoked the *Monell* issue in motions under Rules 12 and 56; the Court of Appeals obviously believed that it was the City's obligation to raise the issue *again* in the second pretrial order. That belief, again, necessarily implies the view that the *Monell* issue is an affirmative defense rather than an element of plaintiff's claim. For if the issue were seen as an element of plaintiff's claim, the penalty for *both* parties' failure to refer specifically to the issue could not logically fall on the defendant.

Although the opinion of the Court of Appeals included various other references to portions of the proceedings below which might be thought to support the "waiver" argument, those references do not obscure the fact that the holding of the Court of Appeals was simply that the City had waived the *Monell* issue *in the second Rule 16 pretrial order*. For instance:

• The Court of Appeals described the City's initial motion to dismiss as having been based "primarily on the ground that [the complaint] was not supported by specific factual allegations." 117 F.3d at 511 [4a]. This cannot obscure the fact that the City specifically relied on the *Monell* limitation on municipal liability in that motion, its very first filing in the case. [56a]. (In light of this fact, it is impossible to accept the District Court's statement, [46a], that the City "successfully conceal[ed] [its position on the *Monell* issue] for four years.").

• The Court of Appeals' description of the City's initial motion for summary judgment as having been directed "on the merits and, alternatively, on grounds of qualified immunity [for an individual defendant]", 117 F.3d at 511 [4a], cannot obscure the fact that the City specifically relied on the *Monell* issue in that motion (as the District Court recognized, 29a).

• The Court of Appeals' statement that the City did not rely on the *Monell* issue in its second motion for summary judgment, 117 F.3d at 511 [5a], is therefore of no weight; a defendant surely does not waive an issue by raising it in one, rather than two, motions for summary judgment. Likewise weightless is the Court of Appeals' quotation of a part of that second motion, in which the City stated that Chief Deutcsh, as the Chief of Police, was "entitled to and obligated to discipline employees of the department . . .", 117 F.3d at 511 [5a]. That statement, of course, does not amount to a concession that Deutcsh was the *final policymaking authority* for such discipline; and the Court of Appeals did not hold that it was such a concession.

• The Court of Appeals noted, 117 F.3d at 511 [5a-6a], that the City sought to appeal the denial of its second motion for summary judgment under 28 U.S.C. § 1292(b), without relying on the *Monell* issue. However, there is certainly no authority to suggest that a failure to raise such an issue under § 1292(b) is a waiver of the issue;

and the Court of Appeals did not suggest such an unsupportable holding.

• The Court of Appeals noted that, during the trial itself, the City did not discuss the *Monell* issue. 117 F.3d at 512 [7a]. The District Court, similarly, noted that the City had not referred to the issue in opening statement or in the presentation of evidence. [36a-37a]. Of course, it was entirely proper for the City not to inject the *Monell* issue before the jury, because it was an issue for the court. Plaintiff's theory as stated in his complaint—and adopted in the pretrial order—was that he would impose liability on the City through the "final policymaker" portion of the *Monell* doctrine. And that issue is one of law for the court. *Praprotnik*, 485 U.S. at 123; *Jett v. Dallas Indep. Schol Dist.*, 491 U.S. 701, 737 (1989). Thus the City did not waive the issue in not arguing it to the jury; and the Court of Appeals did not hold that this was waiver.

• The Court of Appeals noted that the City did not, at first, rely on the *Monell* issue in making its Rule 50(a) motion. 117 F.3d at 512 [7a]. But, as discussed above, the City did raise the issue later during trial and the District Court—without apparent objection from Plaintiff—allowed the City to reopen its Rule 50 motion to include the *Monell* issue. [84a]. The Court of Appeals did *not* hold that the District Court erred in so doing, or that the City's Rule 50 motion was the occasion of the waiver.

It is unfortunate that the City has had to dispel possible confusion from those remarks by the Court of Appeals, as *none* of those remarks was the basis for the Court of Appeals' holding; instead, the Court of Appeals' holding was based squarely on the theory that the City had waived the *Monell* issue in the second pretrial order. 117 F.3d at 515-16 [13a-16a].[2] As shown herein, that

[2] The only procedural step mentioned in the Court of Appeals' legal analysis of the waiver issue, other than the second pretrial order, was a statement by the district court during the trial that

holding necessarily relies on the view that the *Monell* issue is a "defense" rather than an element of plaintiff's claim.

The City does not deny, of course, that it—like all litigants—had to invoke an issue if it hoped to prevail on that issue. But the City undisputedly did that, with regard to the *Monell* issue, both before and after the second pretrial order; the City denied the *Monell* allegation in its Answer, and raised the issue by motions under Rules 12, 56, and 50 (the latter motion, again, having been treated as timely by the District Court during the trial).

Therefore, again, the only way one could hold that the City waived the issue in the second pretrial order is by holding that the *Monell* issue is a "defense", akin to a statue of limitations, arbitration and award, contributory negligence, or so forth, rather than being an element of plaintiff's claim.[3] That is the essence of the decision

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the City had conceded the *Monell* issue, and the City's failure to correct that misimpression immediately. 117 F.3d at 516 [15a]. The Court of Appeals, however, did *not* hold that this was the occasion for the City's waiver; instead, the Court of Appeals (having already held the issue to have been waived in the pretrial order) indicated that this conversation was an additional basis for not *modifying* the pretrial order. *Id.*

It is also worth noting that the City's objection to certain "pattern and practice witnesses", which was the occasion for the district court's statement, was *not* inconsistent with the City's reliance on the *Monell* doctrine. As noted above, Plaintiff's pleadings and pretrial position relied on the *final policymaker* route to municipal liability, and not on a "custom" theory; therefore, any "pattern and practice" was irrelevant to the issue of municipal liability as framed by the pleadings. *See Praprotnik*, 485 U.S. at 126 ("a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it.").

[3] Further underscoring the view of the Court of Appeals that the *Monell* doctrine is a "defense", the Court of Appeals has since cited its decision in this case in support of a conclusion that a party waived the statute of limitations defense by not raising it in the

below; as shown in the following section, that holding requires review and correction by this Court.

II. THIS COURT AND OTHER COURTS HAVE REJECTED THE VIEW THAT THE *MONELL* "POLICY" ISSUE IS AN AFFIRMATIVE DEFENSE, HOLDING INSTEAD THAT IT IS AN ELEMENT WHICH THE PLAINTIFF MUST PROVE; THIS IS AN IMPORTANT ISSUE AS TO WHICH THIS COURT SHOULD RESOLVE THE CONFLICT.

In treating the *Monell* limitation on municipal liability as a defense which a municipality bears the burden of preserving, the decision below conflicts with decisions of this Court and of other federal Circuits which recognize that the Monell issue is part of what the plaintiff must prove in order to impose liability on a municipality under 42 U.S.C. § 1983.[4] Certiorari is therefore necessary in order to resolve this conflict.

Most recently, this Court has held in *Board of County Commissioners of Bryan County v. Brown* that "in *Monell* and subsequent cases, we have required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." —— U.S. at ——, 117 S.Ct. at 1388. This clearly reflects that the *Monell* issue is an element of

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pretrial order. *See Day v. Liberty National Life Ins. Co.*, 122 F.3d 1012, 1016 n.5 (11th Cir. 1997). This parallel treatment of the *Monell* issue and the statute of limitations (a classic "affirmative defense") reflects the Court of Appeals' reasoning in *Morro*.

[4] Indeed, in earlier cases even the Eleventh Circuit apparently recognized that the *Monell* issue is an element of plaintiff's claim, as to which plaintiff has the burden of proof, rather than being a defense. *Riley v. Newton*, 94 F.3d 632, 637-39 (11th Cir. 1996); *Buckner v. Toro*, 116 F.3d 450, 453 (11th Cir. 1997) ("the requirement of a municipal policy or custom constitutes an essential element of a § 1983 claim that a plaintiff must prove in order to establish municipal liability.").

plaintiff's claim against the municipality, rather than a defense. To the same effect was the plurality holding in *City of St. Louis v. Praprotnik* that "[t]he city cannot be held liable under § 1983 unless respondent proved the existence of an unconstitutional municipality policy." 485 U.S. at 128.

Following these decisions of this Court, the Fifth Circuit held in *McConney v. City of Houston*, 863 F.2d 1180, 1184 n.2 (5th Cir. 1989) that "[i]n a section 1983 case, the burden of proving the existence of an unconstitutional municipal policy or established custom rests upon the plaintiff." Likewise, in *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996), the Ninth Circuit held that "[a]s a prerequisite to establishing Section 1983 municipal liability, the plaintiff must satisfy one of three conditions," going on to list three ways of meeting the *Monell* prerequisites for municipal liability, among them (analogous to the contention in Respondent's complaint) that "the plaintiff may establish that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official governmental policy."

As the decision in this case shows, this conflict is no mere academic dispute. The choice between deeming an issue to be a "defense" rather than an element of the claim has important ramifications, not only as to waiver but also (for instance) as to burdens of proof and the

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[5] It is possible that some confusion could arise from this Court's description of the *Monell* issue in *Swint v. Chambers County Comm'n*, 514 U.S. 35, 43 (1995) as a "mere defense to liability". In context, it is clear that the Court was merely differentiating the *Monell* issue from a true *immunity* (such as qualified immunity), explaining that the *Monell* issue is not an appealable "collateral order"; *Swint* did not purport to place the burden on the defendant in the *Monell* issue. However, to the extent that the quoted phrase from *Swint* might generate confusion, that is all the more reason for clarification by certiorari in this case.

parties' respective burdens in seeking or opposing summary judgment. Thus the choice between the Eleventh Circuit's approach, and the approach of this and other courts, becomes a critical issue in many cases.

While correction of such fundamental and simple error may be an unfortunate part of this Court's caseload, it is a necessary part; this Court from time to time is in the position of restating and clarifying fundamental principles. The City respectfully submits that, in this case, this Court is once again in that position; the decision below is based on a fundamental misunderstanding of one of the basic principles of § 1983 jurisprudence, and so review is necessary.

CONCLUSION

For the reasons stated herein, Petitioners respectfully submit that a writ of certiorari should be granted to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6445

SCOTT THOMAS MORRO,
Plaintiff-Appellee,
v.
CITY OF BIRMINGHAM,
a Municipal Corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

July 21, 1997

Before CARNES, Circuit Judge, and HENDERSON and GIBSON *, Senior Circuit Judges.

CARNES, Circuit Judge:

Municipal liability under 42 U.S.C. § 1983 may be premised upon a single illegal act by a municipal officer only when the challenged act may fairly be said to represent official policy, such as when that municipal officer possesses final policymaking authority over the relevant subject matter. The central issue in this appeal is whether the City of Birmingham's Police Chief is a final policy-

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

maker with respect to disciplinary suspension decisions at the City's police department. Had the City not waived the issue, we would be inclined to hold that the Chief is not a final policymaker, because his disciplinary suspension decisions are subject to meaningful administrative review by the Jefferson County Personnel Board. But the City did waive the issue. For that reason and because no issue that was preserved by the City warrants reversal of the judgment, we will not reverse the judgment imposing municipal liability in this case.

I. BACKGROUND FACTS [1]

Scott Morro has been a police officer with the City of Birmingham since 1986. On June 3, 1990, Morro arrested a man named Moses Payne on a charge of disorderly conduct. At that time, Morro's partner, Officer Rodney Hall, was patrolling the Kingston Housing Project with Morro. Hall contemporaneously but independently arrested another man, Benjamin Franklin, who had attempted to interfere with Payne's arrest. Although each officer independently arrested only one suspect, Morro and Hall cross-referenced Payne's and Franklin's arrest reports by listing the two defendants as accomplices of each other. Payne pleaded guilty, but Franklin's case proceeded to trial.

Before Franklin's case went to trial, a highly-publicized event occurred at a July 4 celebration in Birmingham: The mayor's daughter, Erica Arrington, was arrested on charges of inciting a riot. Ms. Arrington was arrested by Officer Jerry Bahakel, who worked in the same precinct as Morro.

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[1] This appeal concerns only questions of law. The facts are largely, but not entirely, undisputed. For present purposes, we have resolved all such disputes by viewing the evidence in the light most favorable to Morro, as we are required to do when a case is in this posture. *See, e.g., FDIC v. Stahl*, 89 F.3d 1510, 1514 (11th Cir.1996).

Ms. Arrington was tried in municipal court before Judge Carol Smitherman. The trial was widely attended by the press and interested citizens. It lasted two days, including a Friday night and a rare Saturday session of municipal court. Morro and a number of other South Precinct officers attended parts of the trial, apparently in a show of support for Officer Bahakel. At the conclusion of the trial, Judge Smitherman found Arrington not guilty of all the charges against her.[2]

Benjamin Franklin's case was scheduled to be heard before Judge Smitherman the very next Monday. Morro was subpoenaed to court, and the City prosecutor interviewed Morro about Franklin's arrest. Apparently, the prosecutor hoped that Morro would be able to identify Franklin, even though Morro had not arrested him, because the arrest occurred contemporaneously with Morro's arrest of Moses Payne. To the prosecutor's disappointment, Morro stated that he could not remember anything about Franklin's arrest. Thereafter, Morro was excused from the courtroom. Officer Hall, who had arrested Franklin, was called as a witness, and he provided sufficient testimony to convict Franklin.

For some time after the Arrington acquittal, Judge Smitherman perceived that there were increasing instances of forgetfulness and absenteeism among officers who were called to testify in her courtroom about arrests they had made. About a month after the Arrington trial, Judge Smitherman complained to the police department about the problem, and an investigation of the matter was launched by the internal affairs division of the department. Lieutenant Lee Ann Self was assigned to conduct

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[2] Other controversial events followed Arrington's acquittal. The Police Chief, Arthur Deutcsh, fired Officer Bahakel. Subsequently, Chief Deutcsh was indicated and convicted of tampering with Arrington's arrest records, apparently in an effort to protect her. However, his conviction was reversed on appeal. *See Deutcsh v. State*, 610 So.2d 1212 (Ala.Crim.App.1992).

the investigation. That investigation was directed toward Morro and one other allegedly forgetful officer.

After concluding her investigation, Lieutenant Self recommended that Morro be disciplined for a violation of departmental rules. Morro was charged with being unprepared for court, and a hearing was held before Police Chief Arthur Deutcsh. Subsequently, Chief Deutcsh suspended Morro without pay for thirty days, and Morro thus became the first officer in Birmingham history to be charged with or sanctioned for being unprepared for court.

As he was entitled to do under applicable City rules and regulations, Morro appealed the Chief's suspension to the Jefferson County Personnel Board. The Personnel Board assigned a hearing officer, Ann Arnold, to hear Morro's case. After hearing all the evidence, she prepared a written report, which recommended that the Board rescind Morro's suspension. The Board agreed, and Morro was reinstated with back pay.

II. PROCEDURAL HISTORY

After Morro was reinstated, he filed this lawsuit, seeking declaratory, injunctive, and monetary relief against Chief Deutcsh (individually and in his official capacity) and the City of Birmingham. The City moved to dismiss the complaint, primarily on the ground that it was not supported by specific factual allegations. The district court dismissed the complaint for vagueness, but gave Morro leave to amend.

Morro timely filed an amended complaint, and the City filed an answer denying all the material allegations it contained. Following a pretrial conference, the City filed a motion for summary judgment. That motion sought summary judgment both on the merits and, alternatively, on grounds of qualified immunity insofar as Deutcsh was sued in his individual capacity. The district court denied the motion, and the City took an interlocutory appeal of the

denial of qualified immunity. Thereafter, this Court issued a three-sentence per curiam opinion that reversed the district court's denial of qualified immunity. *See Morro v. City of Birmingham*, 39 F.3d 325 (11th Cir.1994).

On March 23, 1995, the City filed a second motion for summary judgment. In that motion, the City contended that our prior qualified immunity decision established that the discipline levied against Morro was not the result of any unconstitutional policy. More specifically, the City contended:

> Defendant Deutcsh was at the time of his decision to impose discipline upon the plaintiff the Chief of the Birmingham Police Department. As such he was entitled to and obligated to discipline employees of the department such as plaintiff for actual violations of the rules of the department.

Notably, the City's motion did not allege that Deutcsh was not a final policymaker with respect to departmental disciplinary matters, relying instead on the theory that Deutcsh's actions were not unconstitutional.

The district court denied the City's second summary judgment motion. Thereafter, the court held its second pretrial conference with the parties on April 5, 1995. Following that conference, the district court entered a pretrial order defining the scope of the issues remaining for trial. Absent from the pretrial order is any indication that there was any dispute about whether Chief Deutcsh was a final policymaker with respect to disciplinary suspension decisions at the police department. The issue was not even mentioned.

Following entry of the pretrial order, the City sought certification under 28 U.S.C. § 1292(b) for an interlocutory appeal of the district court's denial of its summary judgment motion. In its motion for § 1292(b) certification, the City did *not* identify as a controlling question of law whether Chief Deutcsh was a final policymaker with

respect to the discipline levied against Morro. The district court granted the § 1292(b) certification, and this Court granted permission for the appeal. However, that interlocutory appeal subsequently was dismissed for want of prosecution, because the City failed to timely file a civil appeal statement form and pay the $105.00 docketing and filing fee.

The case proceeded to a jury trial. The jury was drawn from a "holdover" venire, which consisted of eighteen white venirepersons who had not been selected for services on any of the cases called during the preceding two weeks. The City challenged the venire based on "the way jury rolls are drawn up in the Northern District [of Alabama]," but did not raise any equal protection challenge to the venire on the grounds that it was comprised of "holdover" jurors, all of whom happened to be white. The district court rejected the only venire challenge that the City did raise, and a jury was selected from the all-white holdover jury pool.

During the trial, Morro proffered three "pattern and practice" witnesses. Morro expected those witnesses to testify that they had also suffered adverse employment action at the hands of the Chief in retaliation for their participation in protected speech activities. The City objected on relevancy grounds. The district court sustained the objection on the basis that the City had conceded that the Chief was the policymaker with respect to the disciplinary decision at issue, explaining:

> Well, is it not conceded from the pre-trial, is my recollection of this case . . . that the City of Birmingham, as is true of most if not all municipalities, has as its decisionmaker ultimately with respect to police command decisions the chief, so that we're not talking about and the defendant is not attempting to distance itself from whatever it was that Chief Deutcsh did or didn't do that might or might not constitute a violation of a constitutional right or the

plaintiff because under *Pembaur* and *Praprotnik* and *Jett* he was the City.

The question then is not—And there's no requirement on the plaintiff in this case, is there, to prove that this man, the chief, did in fact exercise the authority in other instances, whether rightly or wrongly, that he exercised here? It's the City. He was the City. And I think the City concedes that.

The City did not take its next available opportunity to correct the district court's observation that it had conceded that the Chief was the final policymaker. Instead, the City adhered to its relevancy objection despite the district court's stated understanding that the objection was premised upon a concession of the Chief's final policymaker status.

Throughout the trial, and consistent with the district courts' explicitly stated rationale for excluding Morro's proffered pattern and practice witnesses, the City made no argument that the Chief was not the final policymaker for § 1983 liability purposes under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). After Morro rested his case-in-chief, the City filed a Rule 50(a) motion for judgment as a matter of law, but did not base that motion on a *Monell* defense. The court announced its intention to deny the City's Rule 50(a) motion, and shortly thereafter the charge conference began. Only then, at the charge conference, did the City attempt to raise a *Monell* issue, by contending that the Personnel Board, and not the chief, was the final policymaker with respect to police discipline. The district court did not respond favorably to the City's belated attempt to raise a *Monell defense*, and it denied the City's Rule 50(a) motion.

During the charge conference, the City withdrew its previously-submitted charge that provided: "You are instructed that the Chief of Police was an official whose acts constitute final official policy of the City of Birmingham."

The City did not offer any substitute charge on the subject during the charge conference. After the district court had finished instructing the jury, the City objected to the district court's failure to include a pattern jury instruction to the effect that municipal liability under § 1983 must be based on a policy or a decision by a final policymaker, *i.e.*, a "*Monell*" charge. The district court refused to give that charge, and the case was submitted to the jury. The jury returned a $150,000 verdict in favor of Morro, and the district court entered judgment on that verdict.

Following entry of judgment against it, the City filed a post-trial motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). In that motion, the City reiterated the argument it had made at the charge conference that Chief Deutcsh was not a final policymaker with respect to disciplinary matters at the police department. The district court denied the City's Rule 50(b) motion and set out its reasons for doing so in a memorandum opinion. With respect to the City's final policymaker argument, the district court held, among other things, that the City had failed to preserve the issue for trial. Specifically, the district court explained:

> Rule 16(e), F.R.Civ.P., provides that the final pre-trial order "shall control the subsequent course of the action unless modified by subsequent order," and that that order "shall be modified only to prevent manifest injustice." The City never requested a modification of the pre-trial order to inject a *Monell* defense. This procedural fact renders academic the question of whether the court could have made such a modification at the last minute without *causing* manifest injustice in contrast to *preventing* it.

This appeal followed.

III. ISSUES

The City raises five issues on appeal. Briefly stated, they are as follows:

1. Whether Chief Deutcsh is a final policymaker under *Monell* and whether the City preserved that issue for trial.
2. Whether the evidence was sufficient to support the jury's verdict.
3. Whether the district court committed reversible error by admitting the Personnel Board Officer's report into evidence.
4. Whether the district court committed reversible error by refusing to give the City's requested instruction on municipal liability.
5. Whether the City's equal protection rights were violated by the selection of an all-white jury from a holdover venire, and whether the City waived that issue.

IV. STANDARDS OF REVIEW

This Court reviews *de novo* a district court's denial of a defendant's renewed motion for judgment as a matter of law, applying the same standards as the district court. *See, e.g., Sherrin v. Northwestern Nat'l Life Ins. Co.*, 2 F.3d 373, 377 (11th Cir.1993). In reviewing the sufficiency of the evidence to support the jury's verdict, we draw all reasonable inferences in favor of the nonmovant, *see, e.g., Walker v. NationsBank, N.A.*, 53 F.3d 1548, 1555 (11th Cir.195), in order to determine "whether or not reasonable jurors could have concluded as this jury did based on the evidence presented," *Quick v. Peoples Bank*, 993 F.2d 793, 797 (11th Cir.1993) (citations and internal quotation marks omitted). However, questions of law presented by such motions are subject to *de novo* review. *See, e.g., Swint v. City of Wadley*, 51 F.3d 988, 994 (11th Cir.1995).

"[W]e ascribe to the trial court a broad discretion to preserve the integrity and purpose of the pretrial order. . . ." *Hodges v. United States*, 597 F.2d 1014, 1018 (5th Cir.1979) (citations omitted). We have explained that a district court should not "for fear of appellate correction, be forced into an overbroad interpretation of such orders. *Id.* at 1017. Accordingly, we will reverse the trial court's decision to follow the pre-trial order only where "the trial court has so clearly abused its discretion that its action could be deemed arbitrary." *Id.* at 1018. Similarly, we review the district court's evidentiary rulings for abuse of discretion. *See, e.g., Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 655 (11th Cir.1993).

So long as a district court's jury instruction "accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed." *U.S. v. Starke*, 62 F.3d 1374, 1380 (11th Cir.1995) (citing *McElroy v. Firestone Tire & Rubber Co.*, 894 F.2d 1504, 1509 (11th Cir.1990)). On appeal, we examine whether the jury instructions, considered as a whole, were sufficient "so that the jurors understood the issues and were not misled." *Id.* (quoting *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1569 (11th Cir.1991)).

V. ANALYSIS

A. MUNICIPAL LIABILITY

1. *Monell's "Policy or Custom" Requirement*

In *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (978), the Supreme Court held that municipalities may not be held liable under 42 U.S.C. § 1983 on a theory of *respondeat superior*. Instead, municipalities may only be held liable for the execution of a governmental policy or custom. As the *Monell* Court explained:

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by *those*

> *whose edicts or acts may fairly be said to represent official policy*, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694, 98 S.Ct. at 2037-38 (emphasis added).

Later, in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), and *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality opinion), the Supreme Court clarified *Monell*'s "policy or custom" requirement. In *Pembaur*, the Court explained that "municipal liability may be imposed for a single decision by municipal *policymakers* under appropriate circumstances." 475 U.S. at 480, 106 S.Ct. at 1298 (emphasis added). In *Praprotnik*, a plurality of the Supreme Court held that "appointing authorities" who have authority to initiate personnel decisions are not municipal policymakers if those decisions are subject to meaningful administrative review. *See* 485 U.S. at 129-30, 108 S.Ct. at 927-28.

Since *Pembaur* and *Praprotnik*, this Court's decisions have consistently recognized and given effect to the principle that a municipal official does not have final policymaking authority over a particular subject matter when that official's decisions are subject to meaningful administrative review. *See Scala v. City of Winter Park*, 116 F.3 1396, 1398-99 (11th Cir.1997) (holding that city manager was not a final policymaker with respect to employment termination decisions at municipal fire department where those decisions were reviewable by the city civil service board); *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 638 (11th Cir.1991) (holding that a mayor was not a final policymaker with respect to zoning decisions where the city charter provided that the city counsel could override the mayor's veto of zoning ordinances); *Mandel v. Doe*, 888 F.2d 783, 792-94 (11th Cir.1989) (recognizing that a municipal officer has final policymaking authority when his decisions "are not subject to review" and holding that discretionary review initiated

by the municipal official himself does not prevent the official from being a final policymaker); *cf. Hill v. Clifton*, 74 F.3d 1150, 1152 (11th Cir.1996) (accepting concession that city police chief was not final policymaker with respect to employment decisions where police chief's decisions could be reversed by the city manager); *Martinez v. City of Opa-Locka*, 971 F.2d 708, 713-15 (11th Cir. 1992) (finding final policymaking authority where "the City Manager's decision to hire or fire administrative personnel is completely insulated from review").

Under our precedents, it is extremely doubtful that Chief Deutcsh is a final policymaker with respect to police discipline such that he may subject the City to § 1983 liability. As the City points out, the Chief's disciplinary decisions regarding dismissal, demotion, or suspension are subject to review by the Jefferson County Personnel Board, with limited further review by the Circuit Court. In fact, the Personnel Board reviewed and reversed the Chief's decision in this case, which demonstrates that the Personnel Board is not meerly a rubber stamp for the Chief. Additionally, attached as appendices to the City's appellate brief are copies of excerpts from the Enabling Act of the Personnel Board of Jefferson County, 1945 Ala. Acts 248 (as amended), the Personnel Board of Jefferson County Rules and Regulations, and the City of Birmingham Supplemental Personnel Policies and Procedures. Those materials seem to take final decisionmaking authority on dismissals, demotions, and suspensions out of the Chief's hands.

Based on the City's governing regulations and evidence of its actual practices, it seems that local law makes the Jefferson County Personnel Board, and not the police chief, the final policymaker with respect to police dismissals, demotions, or suspensions. If the City had preserved that issue for trial in the district court, and thus for our review on appeal, we have little doubt that the City would be entitled to escape the judgment against it on

that basis. However, as the district court noted in its memorandum opinion, the City failed to identify its potentially available *Monell* defense as an issue at the pretrial conference or to obtain a modification of the pretrial order to permit it to raise the issue later in the proceedings.

2. *The City's Failure to Preserve Its Monell Defense*

Federal Rule of Civil Procedure 16(e) provides for the effect that pretrial orders shall have:

> After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Fed.R.Civ.P. 16(e). The use of shotgun pleadings in civil cases is a ubiquitous problem. *See, e.g., Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 168 (11th Cir.1997) (noting that the complaint in that case was "typical of the sort of shotgun notice pleading we have encountered in scores of cases brought before this Court"). Given the seriousness of that problem, it is "particularly important for district courts to undertake the difficult, but essential, task of attempting to narrow and define the issues" before trial. *Id.* Critical to proper discharge of that duty is effective use of pretrial orders, which in turn requires that such orders be firmly (but fairly) enforced.

We have not hesitated to back up district courts when they put steel behind the terms of pretrial orders and hold parties to them. We held in *Hodges v. United States*, 597 F.2d 1014, 1017 (5th Cir.1979), that a defendant can waive a potential defense by failing to ensure that the issue is clearly preserved in the pretrial order. *Hodges* involved a suit brought by two taxpayers who sought a refund of taxes they had paid on behalf of a defunct corporation.

See id. at 1015. At trial, the primary defense of the IRS was that the taxpayers had no standing to sue because they had paid the corporation's taxes as "mere volunteers who had no legal obligation to pay." *See id.* at 1016. However, the IRS also sought to introduce evidence related to an alternative defense that the taxpayers were in fact liable for the amounts paid. *See id.* The district court refused to allow the IRS to assert that alternative defense at trial. It held that the defense was not preserved in the pretrial order, even though the order listed as an issue for trial "[w]hether or not [the taxpayers] can recover the amount sued for on the ground that they had no legal liability to pay. . . ." *Id.* at 1017 n.5.

On appeal, the IRS contended that the foregoing statement in the pretrial order encompassed its alternative defense and, alternatively, that the district court should have modified the pretrial order to conform to the proffered evidence. We upheld the district court's construction of the order, as well as the court's refusal to modify it during the trial. We explained:

> We don't believe the trial judge should, for fear of appellate correction, be forced into an overbroad interpretation of such orders. . . . Without the above rule all litigants would have the burden of anticipating issues whose possible presence in an obfuscated pretrial order is overshadowed by the opposing party's active assertion of totally inconsistent issues. We cannot hold that the district court acted arbitrarily in viewing the unclear pretrial order as not fairly apprising the taxpayers of the defense which the IRS later sought to assert.
>
> We now turn to the IRS's contention that the district court should have allowed the pretrial order to be modified. . . . [W]e ascribe to the trial court a broad discretion to preserve the integrity and purpose of the pretrial order, and in reviewing trial court

> decisions which prevent the introduction of otherwise competent and relevant evidence we will not disturb the trial court's ruling unless it is demonstrated that the trial court has so clearly abused its discretion that its action could be deemed arbitrary. Under the particular facts of this case we cannot say that the district court's actions were arbitrary. . . . We also take note that any injury resulting from our [decision], putting aside issues of surprise and inconvenience . . . is a direct result of the IRS's own failure to properly present its case.

Id. at 1017-18 (citations and footnote omitted).

The standard enunciated in *Hodges* is the law of this circuit, and we have not been shy about applying it. *See Santiago v. Lykes Bros. S.S. Co.*, 986 F.2d 423, 427 (11th Cir. 1993); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 844 (11th Cir.1991); *Braswell v. ConAgra, Inc.*, 936 F.2d 1169, 1176 (11th Cir.1991); *Lexington Ins. Co. v. Cooke's Seafood*, 835 F.2d 1364, 1368 (11th Cir.1988). Applying that standard to this case, we cannot say that in interpreting the pretrial order as not including the final policymaker defense, the district court so clearly abused its discretion that its action can be deemed arbitrary.

Likewise, we cannot say that the district court abused its discretion by failing to modify the pretrial order to accommodate presentation of the *Monell* defense at the late stage of the case at which the City chose to press it. That is particularly so in view of the fact that the City successfully convinced the district court to exclude Morro's pattern and practice witnesses on grounds of relevancy and then stood silent in the face of the district court's observation that the City had conceded at the pretrial conference that the Chief was a final policymaker. As in *Hodges*, we "take note that any injury resulting from our [decision], putting aside issues of surprise and in-

convenience . . . is a direct result of the [defendant's] failure to properly present its case," 597 F.2d at 1018.[3]

B. SUFFICIENCY OF THE EVIDENCE

The City contends that Morro put on insufficient evidence that he was disciplined in retaliation for his First Amendment activity, because: (1) Morro admitted being unprepared for trial; (2) Morro's proof of causation was based solely on the chronology of events; and (3) the Chief's actions were objectively reasonable in light of clearly established law. We find no merit in those arguments.

First, the City provides no record citation for Morro's purported "admisssion" that he was unprepared for court. Our own review of the record has not revealed any such admission, which Morro continues to deny having made. Moreover, even if Morro had made such an admission, it would still be up to the jury to decide whether the Chief's disciplinary decision was actually motivated by Morro's unpreparedness or by his show of support for Officer Bahakel in the Arrington trial. If Morro "pro-

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[3] We note that the City's failure to preserve its *Monell* defense for trial is not excused by the fact that, as we explain *infra* Part V.D, the issue of final policymaker status is a legal question for the court, not the jury. Counsel may waive the right to have an issue decided by failing to identify the issue to the court at the pretrial conference, regardless of whether the issue is a legal or factual one. *See Lexington Ins. Co.*, 835 F.2d at 1368 (explaining that the "same policy applies to . . . legal issues" as factual ones). This case illustrates the sensibility of that rule. Had the City identified the Chief's alleged policymaker status as an issue, the district court might have granted judgment as a matter of law for the City early in the proceedings, after the court had an opportunity to evaluate the question in light of the evidence offered by Morro's pattern and practice witnesses. Instead, both the court and the plaintiff were blindsided with the issue at the end of the case, after the court had excluded because of the City's objection Morro's pattern and practice evidence. That sort of ambush is precisely what the pretrial conference and order are designed to avoid.

duced enough evidence for a reasonable jury to conclude that a retaliatory animus substantially motivated his [suspension], [the City] could only rebut this showing by convincing the jury, not the court, that a legitimate reason justified the decision." *Beckwith v. City of Daytona Beach Shores,* 58 F.3d 1554, 1564 (11th Cir. 1995) (citation omitted). The City failed to do that.

Second, Morro's proof of motive was not based solely on the chronology of events. The very officer who disciplined Morro was involved in a high visibility controversy over whether he had tampered with arrest records in an attempt to protect Ms. Arrington, and testimony concerning that controversy was presented at trial. In view of the entire record, a reasonable juror could have inferred that the Chief was motivated to act against Morro by a desire to punish his First Amendment activity that tended to reflect unfavorably upon the mayor, his daughter, or the Chief.

Finally, the City's clearly established law argument is irrelevant. The issue before us is not qualified immunity, but evidence of a retaliatory motive. As we have explained above, the evidence was sufficient to support a finding of retaliatory motive.

C. ADMISSION OF THE PERSONNEL BOARD OFFICER'S REPORT

Over the City's objection, the district court admitted into evidence the report of Personnel Board Officer Ann Arnold, which recommended that Morro be reinstated, because the charges against him were "not supported by the evidence." In view of that recommendation, the report could be read to imply that the Chief lacked a proper motive in disciplining Morro.

The City concedes that the report was "arguably relevant," but contends that its admission unfairly prejudiced the jury and confused the issues. Morro responds that the

City opened the door to this evidence by suggesting, in its opening statement, that Morro "got a personnel board officer who felt sorry for him." In other words, Morro contends that by introducing the report, he was able to rebut the notion that the personnel board officer made her decision based on emotional factors. Even if admission of the report was otherwise objectionable, the City did open the door to its admission.

Moreover, we note that the district court gave a limiting instruction on the report. Specifically, the district court charged the jury as follows:

> I want to stop because I think I forgot when I talked about what's not evidence, in evidence is the personnel board hearing officer's recommendation upon which the personnel board restored the plaintiff to his job position upon making a decision that the discipline had been improperly imposed. Now, I let that in evidence, and so it is evidence because its in. But I want to explain to you and make sure you understand that the personnel board does its thing, I do my thing, and you do your thing. They are not the same thing. And the mere fact that the personnel board has made a determination, whatever it is, is not binding on you. It does not adjudicate or determine as a final matter of law or fact that Scott Morro did not intentionally or deliberately or negligently fail to be prepared to testify, which is what the charge was. The personnel board made its choice and decision based on what it had. And you had some of the same evidence perhaps that it had. But what it decided does not bind you one way or the other. It's some evidence for you to consider for whatever weight you want to give it. You can give it some weight or no weight.

That limiting instruction was adequate. Particularly in view of that instruction, we cannot conclude that the district court abused its discretion in admitting the report.

D. JURY INSTRUCTIONS

After the initial jury charge, the City objected and requested that the court give the jury the following pattern instruction, or its equivalent:

> Plaintiff claims that the city of ————, a municipality, is liable to him for the constitutional deprivations that he alleges. You are instructed that the city of ———— may be liable where you find that plaintiff has been deprived of his constitutional rights and such deprivation was done pursuant to a governmental custom, policy, ordinance, regulation or decision. When the plaintiff is injured as a result of a government's policy, custom, regulation or decision, whether made by its lawmakers or by those officials whose edicts or acts may fairly be said to represent official policy, the city itself is responsible for the injury that it caused.

Federal Jury Practice and Instructions Vol. 3 § 103.11. The district court declined to give the requested instruction.

We note first that the City's argument concerning its requested instruction is, essentially, a warmed-over helping of its belated *Monell* defense, which we have already held that the City failed to preserve for trial. Even putting that problem aside, however, the City would not have been entitled to the requested instruction, because it puts a question of law before the jury.

In general, we review a district court's refusal to give a requested instruction by applying the following analysis:

> If a requested instruction is refused and is not adequately covered by another instruction, the court will first inquire as to whether the requested instruction is a correct statement of the law. . . . If the instruction is a correct statement of the law, the court will next look to see whether it deals with an issue which is properly before the jury. . . . In the event both

> these standards are met, there still must be a showing of prejudicial harm as a result of the instruction not being given before the judgment will be disturbed.

Dempsey v. Mac Towing, Inc., 876 F.2d 1538, 1542 (11th Cir.1989) (citations omitted) (alterations in original).

Having reviewed the district court's instructions to the jury, we are satisfied that the "policy or custom" component of the proposed instruction was not covered by any other instruction. Therefore, under *Dempsey*, the next question is whether the requested instruction is a correct statement of the law. We are satisfied that it is, and we note that Morro does not argue otherwise. Accordingly, we next examine whether the requested instruction deals with an issue which is properly before the jury. We conclude that the requested instruction fails that prong of the *Dempsey* analysis.

There is no question in this case that the decision to suspend Morro was made by Chief Deutcsh. If the Chief is the final policymaker with respect to the area in question, that single decision can give rise to municipal liability. *See Pembaur*, 475 U.S. at 480, 106 S.Ct. at 1298-1300, 89 L.Ed.2d 452 (finding municipal liability for violation of plaintiff's Fourth Amendment rights where deputy sheriffs unlawfully entered the plaintiff's office on the express instructions of the county prosecutor). However, the Supreme Court has made plain that the question of whether the Chief is a final policymaker is a legal question for the court, not the jury. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S.Ct. 2702, 2724, 105 L.Ed.2d 598 (1989). Therefore, to the extent that the requested instruction asks the jury to determine whether the Chief's actions may fairly be said to represent official policy, that question is not properly before the jury, even if the issue had been waived at the pretrial conference. The district court did not err in refusing the requested instruction.

E. COMPOSITION OF THE JURY VENIRE

After completing its voir dire examination, the City challenged the racial composition of the jury venire based on "the way jury rolls are drawn up in the Northern District [of Alabama]." However the City did not raise any equal protection challenge to the venire on the grounds that it was comprised of white "holdover" jurors until the City filed its post-trial motion for judgment as a matter of law.

The Jury Service and Selection Act of 1968, 28 U.S.C. § 1861 *et seq.*, governs the selection of federal juries. It provides that juries should be selected at random from a fair cross section of the community, § 1861, and outlaws racial discrimination in jury selection, § 1862. In other words, the Act provides the statutory method for enforcing the constitutional rights of litigants in the jury selection process. It also provides a specific method by which challenges to a civil petit jury may be raised:

> § 1867. Challenging compliance with selection procedures
>
> . . . .
>
> (c) In civil cases, *before the voir dire examination begins*, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, *whichever is earlier*, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.
>
> . . . .
>
> (e) The procedures prescribed by this section shall be the *exclusive* means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title.

Id. § 1867(c) & (e) (emphasis added).

In *United States v. Green*, 742 F.2d 609, 612 (11th Cir.1984), this Court held that a criminal defendant's failure to comply with the provisions of § 1867 precluded him from raising on appeal a constitutional challenge to the petit jury venire. We held that "[i]n the absence of strict compliance, Green's attempt to challenge the jury venire on constitutional grounds is without legal effect and is futile." *Id.* *Green* was a criminal case, but it would be anomalous if criminal defendants were held to stricter compliance with § 1867 than civil litigants. The City's equal protection objection to use of an all-white holdover venire was not in compliance with § 1867, because it was not timely. Therefore, under *Green*, the City's equal protection challenge to the holdover jury venire could not be entertained by the district court and cannot be entertained on appeal. Of course, we do not mean to imply that the challenge was in any way meritorious.

VI. CONCLUSION

The City failed to preserve the issue of whether the City of Birmingham's Police Chief is a final policymaker with respect to disciplinary suspension decisions at the City's police department. The City's arguments related to evidentiary sufficiency, admission of evidence, and jury instructions lack substantive merit. The City's equal protection challenge to the composition of the jury venire was untimely. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. ALABAMA
SOUTHERN DIVISION

Civ. A. No. 92-AR-2339-S

SCOTT MORRO,

Plaintiff

v.

CITY OF BIRMINGHAM, *et al.*,

Defendants.

March 23, 1995

MEMORANDUM OPINION

ACKER, District Judge.

The court has for consideration the renewed motion of defendants, City of Birmingham (the "City") and Arthur Deutcsh ("Deutcsh"), in his official capacity as police chief of the City, for summary judgment.

On August 20, 1992, this court denied an earlier motion for summary judgment which had been filed by the City and by Deutcsh, both individually and in his official capacity. The case was originally brought by Scott Morro, a City police officer, pursuant to 42 U.S.C. § 1983, charging that defendants had wrongly disciplined him for exercising his First Amendment right of association and of free speech as a result of his attendance at the public trial of Erica Arrington ("Arrington"), the daughter of the City's

mayor, after her well-publicized arrest. The handling of that arrest led to the criminal conviction of Deutcsh for allegedly altering Arrington's jail records. In denying that first Rule 56 motion, this court noted that there was some evidence that Deutcsh, who had the authority to discipline police officers, had disguised his real reason for his disciplining of Morro by charging Morro with admittedly being unprepared to testify in an unrelated, separate misdemeanor case. The Personnel Board of Jefferson County, which is the body charged with reviewing any discipline meted out to a City employee, agreed with Morro on his appeal from Deutcsh's discipline. This Personnel Board ruling constituted a finding by that tribunal, which had jurisdiction over the matter, that the discipline administered by Deutcsh was unwarranted and, arguably that it was not legitimately traceable to Morro's unpreparedness as a witness.

After this court denied defendants' first said motion for summary judgment, defendants filed a joint notice of appeal to the Eleventh Circuit. On October 19, 1994, a panel of the Eleventh Circuit, in a one-paragraph unpublished *per curiam* opinion, held:

> Given the undisputed facts on Morro's lack of preparedness for court, it was objectively reasonable to discipline Morro. So, Chief Deutcsh, as a matter of law, is entitled to qualified immunity. The district court's order denying summary judgment to Deutcsh in his individual capacity is REVERSED.

The panel said nothing about the separate, simultaneous purported appeals from the denials of the motions for summary judgment by the City and by Deutcsh in his official capacity. This conspicuous absence impliedly either constituted an affirmance of this court's denial of these two separate motions for summary judgment or constituted a dismissal of the appeals taken by the City and by Deutcsh officially because of a lack of appellate juris-

diction inasmuch as these two defendants could not raise qualified immunity as a defense and therefore could not take an early, preemptive appeal as could Deutcsh individually under *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

The panel opinion is certainly subject to being interpreted as a finding that Deutcsh, as a fact, decided to discipline Morro only because of Morro's unpreparedness, despite what appears to be a conflict in the evidence on this subject. This court prefers to believe that Deutcsh individually enjoys qualified immunity because a trier of fact could reasonably believe Deutcsh's version of his motivation for disciplining Morro, and, if it does believe him, his reason would be "objectively reasonable" and thus within constitutional norms. This court cannot disagree with the Eleventh Circuit's description of Morro's lack of preparedness as being "undisputed." It may be true that Morro was unprepared as part of his participation in an organized police officers' protest against Deutcsh's handling of the Arrington affair, something that, if true, is a two-edged sword. What bothers this court as it considers these renewed motions for summary judgment by the City and by Deutcsh in his official capacity is the circumstantial evidence which suggests that Deutcsh's finding of a "lack of preparedness," although factually justified, was in reality a pretext to cover Deutcsh's real or predominant reason, namely, to protect Deutcsh and Arrington from adverse publicity by the use of intimidation. It is indisputably possible that on the proffered evidence a reasonable factfinder, evaluating demeanor and making credibility determinations, could conclude that Deutcsh's true motive for disciplining Morro was retaliation and was unconnected to, or only marginally connected to, Morro's lack of preparedness.

The current joint motion contains the following assertions:

1. The United States Court of Appeals has ruled as a matter of fact that the evidence in this cause shows indisputably that plaintiff was unprepared for court.

2. The United States Court of Appeals has also ruled that based upon plaintiff's unpreparedness it was objectively reasonable to discipline plaintiff.

3. The claims plaintiff has alleged against these defendants are based upon these defendants disciplining him for violating a departmental rule of the Birmingham Police Department. That rule in effect required plaintiff and other officers to be prepared to prosecute cases in which they are involved.

4. If the fact of plaintiff's unpreparedness has been determined against him there does not remain in this case a genuine dispute as to the facts which plaintiff alleges are the basis of the wrong done him by the defendants.

5. The fact established in this case by the Court of Appeals ruling means as a matter of law and fact that the disciplining of plaintiff does not proceed from an unconstitutional practice or policy to violate the rights of plaintiff or of any other person. It is not unconstitutional policy to discipline personnel for actual violation of rules.

6. Defendant Deutcsh was at the time of his decision to impose discipline upon the plaintiff the Chief of the Birmingham Police Department. As such he was entitled to and obligated to discipline employees of the department such as plaintiff for actual violations of the rules of the department. The ruling of the Court of Appeals has established that plaintiff was in violation of those rules in that he was unprepared for court and that was the basis for his discipline.

Defendants' memorandum brief, submitted in support of their present Rule 56 motion, contains, *inter alia*, the following statements:

> On July 4, 1990 a City police officer arrested Erica Arrington, the daughter of Mayor Richard Arrington, on misdemeanor charges. Her trial was begun on July 20, 1990, and was attended by interested citizens, including a number of police officers, including Scott Morro.
>
> * * * *
>
> After earlier hearing arguments and receiving briefs on the issue, the Court of Appeals found as an undisputed fact that Morro was unprepared for court. The court stated *per curiam*, that it was objectively reasonable to discipline Officer Morro.
>
> * * * *
>
> After a supplementary status and scheduling conference on February 22, 1995 on the remaining issues before the district court, defendants filed another motion for summary judgments on the reasoning that the Court of Appeals had decided the central and remaining factual issue in favor of the defendants: to-wit, that Morro was unprepared for court.
>
> * * * *
>
> The City has maintained that the reason for the imposition of discipline on Officer Morro was his unpreparedness for court. While Morro has disputed that he was unprepared for court, he clearly was so unprepared and now the Court of Appeals has found that the issue as to his unpreparedness is undisputed.
>
> * * * *
>
> In the opinion of the District .Court, denying defendants' first motion for summary judgment, the District Court determined that there was a genuine issue of material fact concerning Deutcsh's and the

> City's motivation for disciplining Morro. Then as now the defendants assert that the motivation for the discipline was the undisputed unpreparedness of Morro.
>
> * * * *
>
> To allow this suit to proceed under these facts would inhibit the City and its police department from investigating any officer for any clear rule violation. All the officer would need to do to frighten off discipline is mention some association thought to be frowned on or unpopular with City officials.

As can be seen, the gravamen of the current motion and its supporting brief is movants' insistence that the Eleventh Circuit has now established the law-of-the-case to be that Deutcsh was, in *fact*, motivated only by Morro's unpreparedness, a motive that was, as a matter of fact and law, objectively reasonable and therefore was constitutionally permissible. If movants are correct in their logic starting with the Eleventh Circuit opinion, it would follow that their motions must be granted; but, if movants' logic is correct, why did the Eleventh Circuit not proceed, as it easily could have done, to reverse this court's denial of summary judgment to the City and Deutcsh in his official capacity? This court is left with somewhat of an enigma and a dilemma. This court now attempts to resolve both by expressing its belief that the law of the Eleventh Circuit with respect to qualified immunity is not and cannot be that such absolute immunity is always available as a defense for an individual official if his *articulated* explanation for his action or inaction is "objectively reasonable," that is, not contrary to clearly established constitutional principles, even though that *articulated* explanation may be legitimately disputed as not being the real reason. If this court accepted movants' rationale, Deutcsh, not only individually but also in his official capacity, will be completely off the § 1983 hook. But, if this court is correct in its understanding of the Eleventh Circuit's view of the

qualified immunity defense, the City, and Deutcsh in his official capacity, remain on the § 1983 hook, because a jury may choose not to believe that Deutcsh's *actual* motive for administering discipline to Morro was what Deutcsh says it was.

The City's earlier denied motion for summary judgment pointed out that Morro had not alleged a policy or practice by the City to similarly violate plaintiff's or others' constitutional rights or that the liability sought to be imposed on the City is predicated on a theory of *respondeat superior* contrary to the teaching of *Monell v. Dept. of Soc. Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Morro argued then in response that "the City grants to Deutcsh the final authority to suspend, reprimand, and punish officers and therefore he was the final policymaker with respect to matters involving officer conduct," invoking *Owens v. Fulton County*, 877 F.2d 947 (11th Cir.1989), and *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), as legitimate ways around *Monell* in this case. This court not being familiar with the briefs filed in the Eleventh Circuit, or with the issues the parties actually argued to that court, this court cannot be 100% sure of what the Eleventh Circuit's intended message to this court is with respect to the now asserted summary judgment defenses of the City and of Deutcsh in his official capacity. This court's best judgment is that if the City and Deutcsh in his official capacity were entitled to summary judgment, the Eleventh Circuit would have reversed this court entirely, the mandate would have been unequivocal, and the case would be over. If this court should grant the renewed motion for summary judgment, it would be extending the Eleventh Circuit's opinion beyond what the Eleventh Circuit could have intended.

The court understands why the City would make the argument it now makes. How could an act by a City official that is "objectively reasonable" create § 1983 lia-

bility for the City? This is an interesting question, so interesting in fact that if requested to do so by the City and/or by Deutcsh in his official capacity, the court will enter a certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), because if the City is right in its reading of the Eleventh Circuit's opinion, Morro should not be allowed to proceed to trial, which would be a waste of time.

UNITED STATES DISTRICT COURT
N.D. ALABAMA
SOUTHERN DIVISION

Civil Action No. 92-AR-2339-S

SCOTT THOMAS MORRO,
Plaintiff
v.
CITY OF BIRMINGHAM,
Defendant.

April 12, 1996

Addendum to Opinion April 17, 1996

MEMORANDUM OPINION

ACKER, District Judge.

This case began on October 2, 1992, with a complaint filed by Scott Morro ("Morro"), a policeman for the City of Birmingham ("City"), against the City and Arthur Deutcsh ("Chief"), individually and in his official capacity as Chief of Police of the City. Morro's amended complaint, trimmed of some of the particulars required by the court, charged that the Chief suspended him without pay as punishment for his having attended the trial of Erica Arrington, the daughter of the City's Mayor, as an expression of solidarity with his fellow patrolman, Jerry Bahakel, who had arrested Ms. Arrington. The arrest of Ms. Arrington was a highly publicized and controversial event. Ms. Arrington was acquitted in City court. Bahakel was fired by the Chief. The Chief was subsequently indicted

and convicted of tampering with Ms. Arrington's arrest records.

Morro, apparently anticipating a defense based on *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), circumvented it by alleging that the ultimate policymaker for the City in matters of police discipline was the Chief. In this regard Morro invoked the line of cases that includes *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), and *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

After this court denied motions for summary judgment filed by defendants, they filed a joint notice of appeal to the Eleventh Circuit. The only defendant who had the right to an automatic interlocutory appeal was the Chief in his individual capacity, based on his defense of qualified immunity. A *per curiam* unpublished opinion of the Eleventh Circuit issued on October 19, 1994, agreed with the Chief's qualified immunity defense and held:

> Given the undisputed facts on Morro's lack of preparedness for court, it was objectively reasonable to discipline Morro.

When the subsequent mandate was received by this court, the earlier order denying the Chief's motion for summary judgment in his individual capacity was vacated, and the action as against the Chief individually was dismissed with prejudice.

The "undisputed facts on Morro's lack of unpreparedness" included a dispute as to whether Morro had a legitimate excuse for not being able to identify a particular culprit where two arrests had been made separately but contemporaneously during a neighborhood disturbance. The two arrests were separately effected by a pair of patrolmen, one of whom was Morro. Morro's attention at the time of the dual arrests was arguably focused on the

subject whom he chased and cuffed and not on the other arrestee who was taken into custody by his fellow officer. Both officers were subpoenaed for the misdemeanor trials of the two persons arrested. Morro's subject pled guilty. The other officer was able to identify the person who pled "not guilty," namely, the one he cuffed, and that person was found guilty without the benefit of any testimony from Morro, who, after telling the prosecutor that he could not identify that person, was told by the prosecutor to go home. If Morro is at all credible, it would be just as logical to describe him as "truthful" and "careful not to commit perjury" as it would be to describe him, as the Chief did, as "unprepared to testify." In any event, the Chief, who was himself under investigation for alleged records tampering, signed the charge of unpreparedness developed against Morro by "internal affairs." It was the first such charge ever made against a policeman in the known history of the City. The complaint against Morro originated with the City judge who had found Ms. Arrington "not guilty" while Morro was sitting on the front row of her full courtroom, and who a few days later found the miscreant guilty despite her subsequent conclusion that Morro was "unprepared" to testify against him.

The Chief, in his capacity as the principal executive officer of the Police Department, conducted a hearing on his charge against Morro. The Chief then made the decision to suspend Morro for 30 days without pay. For the purposes of a "qualified immunity" analysis, the Chief's action, as found by the Eleventh Circuit, was "objectively reasonable," in that it was within the realm of logic, but the question clearly remained as to whether the Chief's true motive was something other than what was characterized as Morro's "unpreparedness." Morro appealed his suspension to the Personnel Board of Jefferson County, which, after a *de novo* hearing by a hearing officer, reversed the Chief's decision and reinstated Morro with pay. In other words, the Personnel Board, which considered

virtually the same evidence that the jury in this case eventually heard, agreed in advance with the jury, and either rejected the objectively reasonable conclusion that Morro was "unprepared" or found that the charge of "being unprepared" was simply a pretext for making Morro an example of what can happen to an officer who engages in symbolic speech against the personal interests of the Chief and/or the Mayor on a matter of public interest and concern.

On February 27, 1995, after the Eleventh Circuit had eliminated the action as against the Chief individually, the City and the Chief in his official capacity renewed their motion for summary judgment. The renewed motion added the following grounds:

> 1. The United States Court of Appeals has ruled as a matter of fact that the evidence in this cause shows indisputably that plaintiff was unprepared for court.
>
> 2. The United States Court of Appeals has also ruled that based upon plaintiff's unpreparedness it was objectively reasonable to discipline plaintiff.
>
> 3. The claims plaintiff has alleged against these defendants are based upon these defendants disciplining him for violating a departmental rule of the Birmingham Police Department. That rule in effect required plaintiff and other officers to be prepared to prosecute cases in which they are involved.
>
> 4. If the fact of plaintiff's unpreparedness has been determined against him there does not remain in this case a genuine dispute as to the facts which plaintiff alleges are the basis of the wrong done him by the defendants.
>
> 5. The fact established in this case by the Court of Appeals ruling means as a matter of law and fact that the disciplining of plaintiff does not proceed from an unconstitutional practice or policy to violate

> the rights of plaintiff or of any other person. It is not unconstitutional policy to discipline personnel for actual violation of rules.
>
> 6. *Defendant Deutcsh was at the time of his decision to impose discipline upon the plaintiff the Chief of the Birmingham Police Department. As such he was entitled to and obligated to discipline employees of the department such as plaintiff* for actual violations of the rules of the department. The ruling of the Court of Appeals has established that plaintiff was in violation of those rules in that he was unprepared for court and that was the basis for his discipline.

(emphasis supplied).

The Belated Monell Defense

Neither defendants' original answer to the amended complaint nor defendants' statement of position in the pre-trial order contains an assertion by the City that the Chief was not the City's final policymaker holding a position that could render the City liable pursuant to 42 U.S.C. § 1983 if, operating as such, the Chief deliberately violated an employee's First Amendment right. At the pretrial conference, and throughout the case, there was never any insistence by the City on a *Monell* defense. The closest thing to such a defense was affirmative defense No. 31 contained in the City's answer: "Plaintiff fails to state a claim against the defendant, the City of Birmingham, for which he is entitled to relief." The City went so far as to interpose the so-called *Mt. Healthy* defense, which presupposed a violation by the City of Morro's First Amendment freedom of expression.

On May 23, 1995, this court denied defendants' renewed motion for summary judgment. Thereupon, the City and the Chief in his official capacity formally requested this court to certify that ruling for an interlocutory

review by the Eleventh Circuit pursuant to 28 U.S.C. § 1292(b). The court promptly honored their request, recognizing that a successful appeal of the denial of the renewed motion for summary judgment would be dispositive. The Eleventh Circuit agreed, because on June 2, 1995, it granted defendants' petition for permission to appeal. However, on July 25, 1995, the Eleventh Circuit entered an order dismissing defendants' said appeal "for want of prosecution." A dismissal for want of prosecution is a dismissal *with prejudice*. This particular dismissal constituted an adjudication against the City on the merits of its appeal, establishing as a matter of law that the undisputed facts as found by this court were sufficient to make out Morro's *prima facie* case. When the City took its appeal it had every factual or legal basis for a *Monell* defense that it had when it later moved for a dismissal under Rule 50(a). There is no escaping the conclusion that the existence of a *prima facie* case became the law of the case at the moment defendants' permitted appeal was dismissed. An appeal is nothing more than a complaint addressed to an appellate court. When such a complaint is dismissed with prejudice, the preclusive effect is identical to that occasioned by the dismissal by a *nisi prius* court of an action in that court.

After the dismissal of defendants' second appeal, the case came on for jury trial, during which the evidence consisted of everything that could easily be predicted, that is, except for testimony by Morro of forms of harassment that continued after the Personnel Board's ruling in his favor. There were no real surprises. Consistent with the pleadings and the pre-trial order, defendants made no contention during opening statement, or by any offer of evidence, either (1) that as a matter of police governance Morro could be summarily disciplined for attending a public trial, or (2) that the Chief was not the *alter ego* of the City, or, in other words, that the Chief was not the City's ultimate decisionmaker insofar as administering discipline

to police personnel. Before the case went to the jury, the City and the Chief agreed to Morro's dismissal of his action as against the Chief in his official capacity. This move came after a colloquy with the court, during which the court, and, ostensibly, counsel for Morro, were given every reason to believe that the City was reaffirming its concession that the Chief *was*, for all intents and purposes, the City for the purpose of establishing its § 1983 liability, that is, if the jury chose to believe that the Chief intended to punish Morro for attending the trial of Ms. Arrington. Neither a *Monell* defense nor a *Mt. Healthy* defense was ever a real issue, and no jury instruction was given as to either of them. The Chief was quite properly dismissed as a redundant defendant.

There was ample evidence of a motive by the Chief to punish Morro as a means of stopping a potential rank-and-file protest against the Chief and the Mayor in the Erica Arrington affair. Morro had a plausible explanation for his being "unprepared" in City court. His explanation, as has already been pointed out, was apparently accepted both by the Personnel Board and by the jury, which rendered a verdict in favor of Morro and against the City for $150,000.00, necessarily representing a finding that Morro proximately sustained substantial injury in the form of mental anguish. The City does not claim that this sum is excessive.

Not only was there evidence upon which the Chief's articulated motivation could be questioned, but even after Morro's exoneration by the Personnel Board, Morro's job assignments have been such as to suggest that he continues to be disparately treated by the "powers-that-be" within the Police Department. For instance, Morro still answers to the sergeant who, by appointment of the Chief, vigorously conducted the investigation of Morro's alleged "unpreparedness," and who, in effect, prosecuted him at the hearing before the Chief, and who was the chief witness against him before the Personnel Board and before the

jury. Morro has even been forced to undergo psychiatric counseling, which he may or may not have needed.

When Morro rested his case-in-chief, defendants filed a motion for judgment as a matter of law pursuant to Rule 50(a), F.R.Civ.P. Defendants did not argue that there had been insufficient evidence introduced to support plaintiff's proposition that the Chief was the final decision-maker for the City for the purposes of satisfying *Monell* and establishing municipal liability. Had defendants made such an argument at that time, the court (1) *might* have held that defendants were precluded by judicial estoppel or by Rule 16(e) and the pre-trial order, (2) *might* have allowed Morro to reopen, or (3) *might* have undertaken legal research that had not therefore been undertaken because the court had not been presented with a need to do so. The court denied the said Rule 50(a) motion, finding that Morro had made out his *prima facie* case, and that a reasonable jury, with the responsibility for factfinding and for making credibility determinations, had before it ample evidence, including implicit concessions, upon which it could find for Morro by finding that the Chief was the City's decision-maker and transgressed the First Amendment guarantee of freedom of expression.

The evidence subsequently offered by defendants can fairly be described as being equally supportive of plaintiff's allegations and of defendants' defense of a legitimate, reasonable, constitutional reason for having disciplined Morro. Defendants not only abandoned their *Mt. Healthy* defense, but never offered any evidence in support of a *Monell* defense. It was only *after* Morro dismissed his action as against the Chief and *after* the court had orally announced its intention to deny the City's final Rule 50(a) motion that the City insisted on arguing a *Monell* defense. As the court was about to charge the jury, the City, for the first time, sought to insist that the Chief was not the final arbiter of police discipline, and instead that the Personnel Board was that final arbiter, thus mounting a

Monell defense. The City was suddenly, at the last minute, arguing either that the Personnel Board (which had agreed with Morro) should be Morro's target, or that he had no § 1983 remedy whatsoever.

After the jury rendered its verdict and judgment was entered against the City, the court expressly reserved the right to expand upon its orally stated reasons for denying the City's Rule 50(a) motion. The City then filed its current motion for judgment pursuant to Rule 50(b), arguing several grounds, including the repeated contention that the Chief did not have binding authority for § 1983 purposes, but perhaps that the Mayor did, if not the Personnel Board. If at trial the City had contended that the Mayor constituted the City's final decider in the premises, as it now suggests for the first time, the can of worms would have overflowed. The interrelationships between the Mayor, his daughter, the Chief, and the City judge appointed by the Mayor would have made for a more interesting jury case than even this one was. In fact, there was no evidence whatsoever to suggest that the Mayor participated in the decision to discipline Morro, or that he had the authority to do so. There was, of course, the law, and a belated argument based on that law, that the Personnel Board was the final arbiter of police discipline. When that argument first surfaced just before closing arguments, this court pointed out that to allow the City, as an absolute defense, to rely upon the fact that a disciplined policeman can appeal to the Personnel Board would create impenetrable insulation for a Chief's purposeful violation of the constitutional right of a policeman, no matter how egregious that violation, and would render 42 U.S.C. § 1983 meaningless under circumstances like these.

Furthermore, the Personnel Board is an entity entirely separate from the City. It has responsibilities for personnel matters involving many other municipalities within Jefferson County, as well as for Jefferson County itself. Even more important is the law of Alabama that distin-

guishes the way the Personnel Board of Jefferson County operates from the way other personnel boards in Alabama, Florida and Georgia operate. Section 22 of Act No. 2482 of the Legislature of Alabama of 1945 (a general act of local application to Jefferson County), as amended by Act No. 562 of the Legislature of Alabama of 1947, by Act No. 670 of the Legislature of Alabama of 1953, by Act No. 1600 of the Legislature of Alabama of 1971, and by Act No. 679 of the Legislature of Alabama of 1977, provides:

> *Dismissal, Demotions and Suspension.* An appointing authority may dismiss or demote an employee holding permanent status for just cause whenever he considers the good of the service will be served thereby, for reason stated in writing, served on the affected employee, and a copy furnished to the Director, which action shall become a public record. The dismissed or demoted employee may within ten days after notice, appeal from the action of the appointing authority by filing with the Board and the appointing authority a written answer to the charges. The Board must order a public hearing of such charges, and if the Board finds the employee not guilty, the Board shall order the reinstatement of the employee under such conditions as the Board may determine. If the Board finds the employee guilty, the Board shall determine whether the employee shall be dismissed, demoted, suspended, or otherwise disciplined. In addition to removal or demotion by an appointing authority, an employee may be removed, demoted, suspended or otherwise disciplined in the following manner. Charges may be filed by any officer, citizen or taxpayer of the State with the Director who shall within five days cause a copy to be served upon the person complained against and shall set a day not more than twenty days after such charges have been served on such employee for a public hear-

ing of such charges. This hearing may be before the Director, a special agent appointed for the purpose by the Director, or the Board itself. If before the Director or a special agent, the Director or special agent shall take testimony offered in support and denial of such charges and from the same submit to the Board, within five days, a finding of facts and law involved and a recommended decision. The Board at its next regular or special meeting shall consider said report and modify, alter, set aside or affirm said report and certify its findings to the appointing authority who shall forthwith put the same into effect. If the Board hears said charges directly or requires the transcribing and submission of the testimony taken before the Director or special agent, it shall make up and file its own findings and decision. An employee may also be removed, demoted, suspended or otherwise disciplined upon charges made by the Director and referred to the Board based upon investigation conducted upon his own initiative or upon complaints referred to the Director by a member of the Personnel Board when the Director after such investigation shall be reasonably satisfied that such charges are warranted. Charges preferred by the Director shall be served and a public hearing held by the Board within the time and in the manner prescribed where charges are preferred by an officer, citizen or taxpayer of this State. Any interested party at such hearing may be represented by counsel. All proceedings at the hearing shall be recorded by a competent stenographer or mechanical recording device. *The decision of the Board based upon all proceedings before the Board shall be final subject to appeal by either party to the Circuit Court to review questions of law and the question of whether or not the decision or order of the Board is supported by the substantial and legal evidence.* On such appeal the Circuit Court shall review the record and shall

affirm, reverse, remand or render said cause. The decision of the Board shall be controlling until reversed on appeal as provided for herein. *The appeal shall be perfected by filing with the Director of Personnel a statement in writing signed by the party appealing to the effect that said party appeals from the decision or order of the Personnel Board to the Circuit Court, which statement shall be filed within ten days from the announcement of the decision or order of the Personnel Board; provided further, that the party taking an appeal shall file with the Clerk of the Circuit Court, security for costs in an amount approved by any judge or said Circuit Court, which security for cost may consist of a cash deposit or a bond executed by such party appellant and a surety or sureties approved by the said Circuit Clerk.* Such security for costs shall be filed by the party taking the appeal within ten days from the announcement of the decision or order of the Personnel Board. Within ten days from the filing of such statement of appeal the Director of Personnel shall forward to the Circuit Clerk the original or copies of charges preferred and the answer filed to such charges and a complete transcript of all the proceedings before the Personnel Board at such hearing. In the event the Director is unable to complete such transcript of all the proceedings within ten days, the Presiding Judge of the Circuit Court shall allow the Director such additional time as may be necessary to do so. In the event copies of said charges and answer are forwarded to the Circuit Clerk instead of the originals, the Director of Personnel shall certify that such copies are true and correct copies of the originals. The Personnel Board shall make no charge for furnishing the copy of the record required by the Circuit Court.

Upon receipt of said papers the Circuit Clerk shall present the same to the Presiding Judge of the Cir-

cuit Court or the Circuit Judge sitting in place of the Presiding Judge if the regular Presiding Judge be absent; and the Presiding Judge or the Judge sitting in his absence shall assign the case so appealed to three Circuit Judges of said Circuit who shall jointly review the record of the hearing before the Personnel Board. The Presiding Judge or the Judge sitting in his absence in the order assigning such case for review shall designate one of the three Judges to whom the case is assigned as Presiding Judge of such panel. Any such appeal shall be considered and determined as a preferred case in the Circuit Court. The opinion of a majority of three judges to whom such case is assigned shall be determinative of the case and there shall be no appeal to any appellate court of Alabama. The cost of said appeal shall be taxed against the unsuccessful party. If any employee shall wilfully refuse or fail to appear before any Board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or answer any question relating to the affairs of government or the conduct of any officer or employee on the ground that his testimony or answers would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any matter about which he may be asked to testify and shall not be eligible for appointment to any position under the jurisdiction of this Act. An appointing authority may, from time to time, peremptorily suspend any employee without pay or other compensation, and without the right of a hearing, as punishment for improper behavior, but any one suspension shall not exceed five days and the total suspension by such appointing authority of such person shall not exceed ten days in any year of service. Such suspension with loss of pay may be effected only by service upon the employee by the appointing authority of written charges setting

> out clearly the delinquency for which such suspension was made, a copy of which must be at the same time mailed or delivered to the Director. The suspended employee shall have the right to file with the Board and the appointing authority a written answer or explanation of such charges. Any employee suspended without right to a hearing before the Board may obtain a review of his or her suspension by the appointing authority by filing with the appointing authority not more than ten days thereafter a written answer to such charges and a request for such review. A hearing shall be held thereon not more than twenty days thereafter to determine whether such suspension should be rescinded. At any such hearing such employee may be represented by counsel and present relevant testimony. The appointing authority may authorize a representative to conduct such hearing and submit within five days thereafter a finding of facts and law together with recommendations to the appointing authority. Within a period of ten days after such hearing the appointing authority may rescind all or any part of such suspension. A suspended employee shall be entitled to full salary for any period of suspension rescinded hereunder.

(emphasis supplied). Not only did Morro have a right to appeal to a three-judge court if the Personnel Board had decided against him, but despite the provision in Section 22 to the contrary, there would have been a limited review of the three-judge panel's decision to the Court of Civil Appeals of Alabama. *See Ex parte Personnel Bd. of Jefferson County*, 440 So.2d 1106 (Ala.Civ.App.1983). In other words, if the employee victim of a constitutional tort in the form of wrongfully administered discipline is limited to a § 1983 complaint against the ultimate possible decider on the matter of discipline, a § 1983 defendant in cases arising in Jefferson County would have to be the Circuit Court of Jefferson County (or a three-judge panel

thereof), or the Court of Civil Appeals. This is far from what § 1983 intended.

At the late stage at which the City attempted to raise *Monell*, it was judicially estopped from contending that the Chief was not lawfully assigned the binding responsibility for administering discipline within his Department. In its above-quoted second motion for summary judgment, the City plainly said:

> Defendant Deutcsh was at the time of his decision to impose discipline upon the plaintiff the Chief of the Birmingham Police Department. As such he was entitled to and obligated to discipline employees of the department such as plaintiff. . . .

If this court or plaintiff's counsel had been seriously faced earlier with a contention by the City that the Chief's authority did not provide Morro his way around *Monell*, the court would not only have more carefully studied *Pembaur* and *Praprotnik* but would have carefully read *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), and would certainly have discovered *Hill v. Clifton*, 74 F.3d 1150 (11th Cir.1996), decided only a month before the instant case went to trial. The City did not even mention *Hill v. Clifton* until its post-judgment motion.

An excellent, and still valid, statement of the principle of judicial estoppel is found in *Texas Co. v. Gulf Refining Co.*, 26 F.2d 394, 397 (5th Cir.1928), *cert. denied*, 278 U.S. 625, 49 S.Ct. 27, 73 L.Ed. 545 (1928), as follows:

> A party, who in litigation with his adversary has, with knowledge of the facts, asserted a particular claim, title, or right, cannot afterward assume a position inconsistent with such claim, to the prejudice of the same adversary, who has acted in reliance on such claim being as it was previously made; in other words, a party who, for the purpose of maintaining

> his position in litigation, has deliberately represented a thing in one respect, is estopped to contradict his own representation by giving the same thing another aspect in litigation with the same adversary as to the same subject-matter. *Ohio & Miss. Ry. Co. v. McCarthy*, 96 U.S. [(6 Otto)] 258, 24 L.Ed. 693 [(1877)].
>
> * * * *
>
> From the beginning appellant had knowledge of the facts upon which it bases the claim asserted in this suit. Notwithstanding its possession of that knowledge, for more than nine years it refrained from making the claim now asserted, in the meantime so conducting itself as to conceal from appellee even the probability or possibility of such a claim being made. . . .

While the City in the instant case did not conceal its *Monell* defense for nine years as was done in *Texas Co.*, the City did successfully conceal it for four years. In the instant case there was no reason or inducement for Morro to develop or to present evidence to support his *Pembaur* or *Praprotnik* theory. Thus, the city created the basis for judicial estoppel.

Rule 16(e), F.R.Civ.P., provides that the final pretrial order "shall control the subsequent course of the action unless modified by subsequent order," and that that order "shall be modified only to prevent manifest injustice." The City never requested a modification of the pretrial order to inject a *Monell* defense. This procedural fact renders academic the question of whether the court could have made such a modification at the last minute without *causing* manifest injustice in contrast to *preventing* it.

Assuming *arguendo* (1) that the City is not estopped by its implicit concession that the Chief had the City's final policymaking power as to the subject at hand; and

(2) that the issue of the Chief's authority was not finally adjudicated against the City by the dismissal with prejudice of its most recent appeal to the Eleventh Circuit, the *Monell* question is still answered in favor of Morro by the evidence. First, the apparent reason for bringing up for the first time the Mayor as the final policymaker vis-a-vis Morro is to try to bring this case in alignment with the very recent decision of *Hill v. Clifton.* There, the city manager and not the police chief was found to have final authority to take disciplinary action against police personnel, thus heading off the *Pembaur* and *Praprotnik* approach. As distinguished from *Hill v. Clifton,* there was no evidence whatsoever in the instant case that the City's Mayor could have disciplined Morro. If the Mayor participated in the decision, that participation remains undiscovered, and the court finds no reason whatsoever to think that the Mayor was ever anything but a chagrined and interested father. Furthermore, the City overlooks or misstates the Personnel Board's role as an actor. The Personnel Board of Jefferson County is not an actor, but a reactor. The actor was Chief Deutcsh. The existence of the Personnel Board as a means of review only provided Morro an expanded opportunity to obtain "due process." He is not complaining of a denial of "due process." If the fact that the Personnel Board had the right to overrule the Chief makes the Personnel Board the *Monell* policymaker for the City, the City overlooks, either deliberately or mistakenly, the significant differences between *this* personnel board and *other* personnel boards within the territorial jurisdiction of the Eleventh Circuit. Lastly, the City by credible evidence of continued disparate treatment of Morro, arguably ratified and confirmed the Chief's adverse employment decision, reversed though it was by the Personnel Board. Perhaps the City was retaliating against the Personnel Board as well as against Morro. The Personnel Board is an entity which the City admits it doesn't care for.

In addition to published opinions, the City cites the unpublished opinion of Hon. Robert B. Propst of this court in *Bohakel v. City of Birmingham*, CV 90-PT-1834-S, affirmed by the Eleventh Circuit without opinion. Judge Propst's opinion, although not binding, might well be persuasive if it were not for the fact that the Bahakel case was markedly different from the Morro case in several important respects. Those crucial distinctions need not be explored here.

The City's Attack on the Jury Venire

When the venire appeared for the selection of seven civil jurors for the trial of this case, the venire consisted of eighteen white venirepersons. Defendants complained about the absence of black venirepersons, but the court proceeded with jury selection. Defendants adequately preserved their objection to the venire.

Even before the filing of the City's current Rule 50(b) motion, the court undertook its own investigation into the matter of the venire composition. The court consulted with the jury section of the Clerk's office and with other members of the court and arrived at the same explanation for the racial makeup of this particular venire as can be deduced from the City's motion. In solving one problem *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), created another. This venire was randomly drawn for this court's one case mid-month civil docket to start on March 18, 1996. The venire came from the "leftovers" from a much larger venire summoned for jury duty to commence at the beginning of the month on March 4, 1996, and designed to accommodate the jury needs in several criminal and civil trials before various judges.

It quickly becomes apparent that the juries actually empaneled in the Northern District of Alabama at the first of the month, by the exercise of so-called "preemptory"

challenges, contain a higher percentage of black jurors than the original venire as a whole. This fact strongly suggests that *Batson* acts as a brake on the striking of black venirepersons, and has the indirect effect of leaving the remaining pool with a higher percentage of whites and a lower percentage of blacks than were in the original, total venire. In other words, by the middle of the month, the black jurors have been disproportionately "used up" as a proximate consequence of *Batson*. This court's research has not led it to a solution of this problem, if it is a problem, or to any case law which would render unconstitutional or illegal this court's present system of jury selection. It would be enormously expensive, and perhaps unconstitutional, to randomly select from 31 north Alabama counties a separate venire for each and every specific jury case. The court can conceive of no other method that would come close to assuring an apportional racial representation in every venire.

Although *Batson* itself was not invoked in this case, except perhaps in an indirect way, *Batson* and its progeny are as much designed to protect potential jurors from disparate treatment as to guarantee litigants a racially or gender balanced jury. Therefore, if the local media correctly reports that the Mayor was not surprised by the verdict in this case against the City "from an all white jury," the Mayor is only exercising his freedom of expression, just as the jury found Morro to be doing. The Supreme Court in *Batson* would not agree with the Mayor as to what can be expected from an all-white jury, because it there said:

> Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen *on the assumption that they will be biased* in a particular case simply because the defendant is

> black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors *on the basis of such assumptions*, which arise solely from the jurors' race.

476 U.S. at 98, 106 S.Ct. at 1724 (emphasis supplied) (citation omitted). This expression can only mean that the Supreme Court believes, as this court does, that jurors of whatever race are presumed to be free of race prejudice, especially when they are instruced that prejudice can play no part in their deliberations.

It might also be worth noting that Chief Deutcsh, like Morro, is white, that Morro's fellow arresting officer, who was called as a witness by the City but whose testimony was more favorable to Morro than to the City, is black, and that the police sergeant who investigated Morro, who testified against him and who now supervises him, is white. In fact, the testimony from the present Chief, who is black, was not particularly flattering to former Chief Deutcsh. This court could not detect any racial bias in a very attentive jury.

The City's Last-Minute Proffer of a Newly Found Witness

The sergeant who investigated Morro, who testified against him before the Chief, before the Personnel Board and before the jury, and who now supervises him, during the trial suddenly found an alleged witness who the City said could contradict Morro's denial of an intent to join in a police conspiracy of silence against the City judge who had found Ms. Arrington "not guilty." Morro's case has been pending since 1992. Morro has testified on several occasions, including before the Personnel Board hearing officer. He has been consistent in denying any deliberate avoidance of duty. The final pre-trial order required the listing of witnesses. To have allowed an unlisted and

still unnamed witness to testify for the City after Morro rested would have been unfair, prejudicial, and prolonging. The sustaining of Morro's objection to such a witness was well within the court's discretion granted by Rule 16(e), F.R.Civ.P., and Rule 403, F.R.E.

Conclusion

All of the City's arguments worthy of response have, in this court's opinion, been responded to. There is no purpose to be served by saying what this court would have done at a bench trial of this case. This was a jury case tried by a jury peculiarly equipped to make credibility assessments on conflicting evidence, and the jury discharged its responsibility. For that reason, the City's post-judgment motion will be denied by separate order.

ADDENDUM TO MEMORANDUM
OPINION OF APRIL 12, 1996

Whether it is called "judicial estoppel," or by some other name, a good statement of the principle which, in this court's opinion, precluded the City's last minute reliance on a *Monell* argument, is found in *In the Matter of Linda Coal and Supply Co.*, 255 F.2d 653 (3d Cir. 1958), in which the Third Circuit held:

> [T]he reason for holding a litigant to his announced theory becomes more compelling as the litigation proceeds to advanced stages. And the desirability of seeing an end to litigation would still call for application of the general rule for so confining a litigant if either the petition or the evidence are not permeated with the alternative theory which is now fully spelled out for the first time at this late date.

The First Circuit adopted the Third Circuit's reasoning as follows in *Wallace Motor Sales v. American Motors Sales Corp.*, 780 F.2d 1049, 1067 (1st Cir.1986):

> In *In Re Linda Coal and Supply Co.*, 255 F.2d 653 (3d Cir.1958), the Third Circuit addressed a similar situation where appellant claimed a theory on appeal which was not raised at trial but had been raised in the pleadings. In that case, the court refused to consider the alternative theory "which at best was raised only inferentially in the pleadings," *id.* at 656, and held that if neither the pleadings nor the evidence at trial were "permeated" with the alternative theory, it could not be raised on appeal. We adopt the reasoning of the Third Circuit.

The foregoing shall be considered an addendum to the memorandum opinion of April 12, 1996.

APPENDIX C

[Filed Sep. 15, 1997]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-6445

SCOTT THOMAS MORRO,
Plaintiff-Appellee,

versus

CITY OF BIRMINGHAM,
a Municipal Corporation,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: CARNES, Circuit Judge, and HENDERSON and GIBSON *, Senior Circuit Judges.

PER CURIAM:

---

* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E. L. Carnes
United States Circuit Judge

APPENDIX D

[Filed Oct. 26, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number: CV 92-AR-2339-S

SCOTT MORRO,
Plaintiff,

VS.

CITY OF BIRMINGHAM,
a Municipal Corporation and
ARTHUR DEUTCSH,
Individually and in his Official Capacity,
Defendants.

MOTION TO DISMISS

Comes now the City of Birmingham, a Municipal Corporation, and Arthur Deutcsh, both individually and in his Official Capacity, by and through their Attorney, and moves the Court to enter an Order of Dismissal of the action filed against the above-styled Defendants, and as grounds for this motion shows the following:

(1) Plaintiff's Complaint fails to state a claim against these Defendants upon which relief may be granted.

(2) The complaint consists of vague allegations which are not supported by specific factual allegations against any of the defendants and therefore constitute no basis for a § 1983 cause of action. *Oladeinde v. City of Birmingham*, 963 F.2d 1481 (11th Cir.1992); *Arnold v.*

Board of Educ. of Escambia County, Ala., 880 F.2d 305 (11th Cir. 1989).

(3) The complaint fails to state any official policy, practice, or custom of the City of Birmingham which resulted in a violation of plaintiff's rights protected by the United States Constitution or the Constitution of the State of Alabama or the laws of the United States or the State of Alabama. *Monell v. New York City Department of Social Services*, 436 U.S. 658; 98 S.Ct. 2018 (1978).

(4) The complaint does not allege what associations of the plaintiff the defendants sought to interfere with or what public issues the defendants attempted to deter plaintiff from discussing.

(5) The complaint alleges that "plaintiff has been subjected to harassment and intimidation as a result of pursuing the said appeal". Nowhere in the complaint does plaintiff state what harassment occurred nor what acts of or by the defendants constituted intimidation.

(6) Plaintiff nowhere in the complaint denies the allegation that he was unprepared to prosecute the criminal case in question. Such unpreparedness forms a legitimate basis for the discipline imposed.

(7) Plaintiff alleges no conduct on the part of the defendants which shocks the conscience, therefore no substantive due process rights are implicated. Therefore no due process claim for which relief might be granted is stated. *Faucher v. Rodziewicz*, 891 F.2d 864 (11th Cir. 1990); *Oladeinde*, 963 F.2d at 1486.

Based upon the above and foregoing, Defendants, City of Birmingham and Arthur Deutcsh, individually and in his official capacity requests this Court Dismiss the Plaintiff's above-styled action.

/s/ John M. Edens
JOHN M. EDENS
State Bar I.D. 240-82-4643

/s/ Thomas Bentley, III
THOMAS BENTLEY, III
State Bar I.D. 419-76-0936
Attorneys for Defendants

City of Birmingham
Department of Law
600 City Hall
Birmingham, AL 35203
(205) 254-2369

[Filed Dec. 17, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT, ALABAMA
SOUTHERN DIVISION

Civil Action No. CV 92-AR-2339-S

SCOTT MORRO,
Plaintiff,

vs.

CITY OF BIRMINGHAM,
a municipal corporation;
ARTHUR DEUTSCH, individually and
in his official capacity as Birmingham Chief of Police,
Defendant.

AMENDED COMPLAINT

Jurisdictional and Factual Allegations

1. Plaintiff brings this action for declaratory and injunctive relief and monetary damages for the violation of his rights under color of state law by defendants. Jurisdiction is pursuant to 42 U.S.C. 1983, and 28 U.S.C. 1343 and the Constitutions of the United States and the State of Alabama.

2. Plaintiff if over 19 years of age and a resident of Jefferson County, Alabama. The defendant City is a municipal corporation located in the Northern District of Alabama. Defendant Deutsch who was, at all times relevant, the duly appointed Police Chief of the City of Birmingham, and was the principal executive officer of the said department of the City Government. Defendant Deutsch is sued in his individual and official capacities.

3. Plaintiff, who is, and at all times relevant was, a police officer employed by the City of Birmingham. On or about October 9, 1990, plaintiff was suspended without pay for 30 days without pay. Defendants charged plaintiff with the following: "that on Monday, July 23, 1990, at approximately 6:00 p.m., [plaintiff] came to City Court (Judge Carole Smitherman) unprepared and unable to testify in a case in which [plaintiff] was an arresting officer."

4. Plaintiff appealed the said disciplinary action to the Personnel Board of Jefferson County, the public body having jurisdiction over the employees of the City of Birmingham. After consideration of plaintiff's appeal, the suspension was reversed in favor of plaintiff.

5. Defendant Deutsch instituted disciplinary action to punish plaintiff for attending a public trial and to deter plaintiff and other employees from associating or discussing matters of public concern. In particular, on or about the 20th day of July, 1990, plaintiff attended the misdemeanor trial of Erica Arrington, the daughter of the City's Mayor. The arresting officer, Jerry Bahakel, testified at the trial before Judge Smitherman. Many citizens, including plaintiff, were in attendance as Ms. Arrington's arrest was a matter of extreme public concern, involving extensive public debate and news coverage. Public statements, both in support of and against Bahakel, concerned issues of police brutality, favoritism being shown to persons associated with the Mayor, the alteration of public records, and the harassment and punishment of police officers who took public positions contrary to the City Administration. Defendant Deutsch was personally involved in the public furor due to widely publicized allegations that he directed the alteration and attempted destruction of public records of Ms. Arrington's arrest. These allegations against Deutsch, coupled with the suspension of Officer Bahakel and the ongoing investigation by the District Attorney's office which ultimately resulted in conviction of Deutsch, created a matter of public con-

cern which affected any officer perceived as a supporter of Bahakel.

6. On July 23, 1990, shortly after plaintiff's attendance at the trial of Erica Arrington, plaintiff was again in Court before City Judge Smitherman. On this occasion, plaintiff had been subpoenaed to offer testimony regarding the arrest of Benjamin Franklin, a case unrelated to the Arrington arrest. Officer Rodney Hall, plaintiff's partner, was present to testify as the arresting officer. Plaintiff advised the prosecuting attorney that although Hall listed plaintiff's name on the arrest report, plaintiff was not the arresting officer and did not presently recall the factual details of the Franklin arrest. Whereupon the prosecutor released the plaintiff to return home. Officer Hall remained and offered testimony which resulted in the conviction of this defendant for disorderly conduct. Although Judge Smitherman was aware that plaintiff conceded an inability to recollect details of the arrest made by his partner, she did not file a complaint with the Birmingham police against plaintiff.

7. Nonetheless, on August 24, 1990, plaintiff was interrogated by Internal Affairs (IAD) and repeatedly and falsely accused of being deliberately "unprepared" to testify in the July 23rd criminal case. Plaintiff was falsely accused of participating in a conspiracy to impede the judicial process. IAD accused plaintiff of being "angry" at Judge Smitherman for her role in dismissing the charges brought by Officer Bahakel against Erica Arrington. The IAD Officers warned plaintiff that "playing games with the Court could be very dangerous". The interrogation of plaintiff was conducted in an oppressive and accusatory manner as reflected in the excerpts of the interrogation attached hereto and incorporated herein as Exhibit "A". Thereafter, the department conducted other interviews of persons having involvement in the arrest incident and trial, including Judge Smitherman, prosecuting attorney, Pat Burns, and fellow Officer Rodney Hall. The information collected during the investigation failed to establish

the existence of any misconduct on the part of the plaintiff or the existence of a conspiracy.

8. Despite the lack of evidence, and based on conjecture, disciplinary charges were brought by defendant Deutsch against Morro on October 9, 1990. Plaintiff was suspended without pay for a period of 30 days. Plaintiff appealed this suspension and a hearing was held by the Personnel Board of Jefferson County. Although Judge Smitherman never filed a complaint against plaintiff with IAD, she was questioned about plaintiff's inability to assist with the Franklin trial. At the Personnel Board hearing, Judge Smitherman identified plaintiff as "officer of the year" and a front row "spectator" at the Arrington trial. During cross examination of plaintiff, the City Attorney focused, not on the Franklin trial, but rather on plaintiff's attendance of the Erica Arrington trial as a "spectator":

> City Attorney: So you decided not to attend as a spectator at the trial of Benjamin Franklin, correct?
>
> Morro: No sir, it is normal that when you go to Court you try to leave as soon as you can because you want to get home to your family or that sort of thing, because that is extra time.
>
> City Attorney: And if you are interested in some other trial you try to attend, such as the Arrington trial?
>
> Morro: Right. I was very interested in that.
>
> City Attorney: You would agree that you were more interested in the outcome of that trial than the outcome of Benjamin Franklin's.

Objection.

> Morro: Being the fact that I didn't remember the arrest, I didn't see where it was any interest to me at all.

City Attorney: Even though you were listed as assisting or being the partner of Rodney Hall.

Morro: That is why I asked Pat Burns and I told her I wanted to ask her before I left if there was anything I needed to do. She told me I could leave so I did. I didn't just do it and leave on my own.

City Attorney: Other than the Arrington trial have you attended any other trials as a spectator that is to find out whether or not there was a case or a report any other case.

Morro: No, I can't say as I have ever spectated on any other one.

City Attorney: You did not agree with the resolution or the outcome of the Arrington trial?

Objection, that is his business, his right, however he feels about it.

9. Plaintiff avers that defendant Deutsch, acting individually and as a policy maker for the City of Birmingham, intentionally and maliciously sought to punish plaintiff for his association with and attendance of the trial of Erica Arrington. Moreover, Deutsch was motivated by the desire to intimidate others within the department from association with Bahakel or otherwise engaging in speech, conduct or assemblage relating to the arrest or trial of Arrington or the related records tampering activities of Deutsch.

10. During the appeal of the charges brought against him and thereafter, plaintiff was subjected to harassment, abuse and discriminatory treatment. Plaintiff avers that he was denied shift preferences and placed under greater scrutiny regarding his productivity. Plaintiff avers further that defendants denied him the opportunity to schedule his off days consistent with the privileges afforded police officers with comparable seniority. Plaintiff avers further that while under the supervision of Sgt. Jake Baley, he

was subjected to extreme scrutiny and unwarranted verbal criticism. On or about April 1991, Bailey warned plaintiff that "you can't live with the 4th of July forever", referring to the arrest of Erica Arrington.

11. At the hearing before the Personnel Board, it was clear that defendants were punishing plaintiff for his association and attendance at the Arrington trial. The focus of the City's case was clearly not upon whether or not plaintiff came "unprepared" to the July 23rd trial of a disorderly citizen, but rather to punish plaintiff for attending the Erica Arrington trial. The City Attorney's pre-occupation with plaintiff's attendance of the Arrington trial precipitated not only the IAD investigation of plaintiff but also the suspension which was later ordered by defendant Deutsch. Defendants knew following the IAD investigations that this allegation of "selective amnesia" was without foundation, but proceeded to punish plaintiff by suspending him.

COUNT I

First Amendment Claims

12. Plaintiff adopts and realleges paragraphs 1 through 11 as if fully set forth herein.

13. Plaintiff avers that the acts and conduct of the Chief, acting individually and as an official policy maker of the City, denied the plaintiff his constitutional rights of free speech and freedom of assembly by directing and issuing a disciplinary suspension (Exhibit B) which was motivated by and a direct result of plaintiff's attendance at the trial of Arrington.

14. Plaintiff avers that plaintiff was subjected to disparate treatment through the discriminatory enforcement of rules and regulations of the Department, harassment, abuse, and other retaliatory conduct on the part of the defendants, separately and severally, occurring during the

investigation and appeal of the unfounded charges brought against plaintiff: to-wit, plaintiff was falsely accused of deliberately impeding judicial process, abused during the interrogation process, suspended for pretextual reasons, and suffiered discriminatory enforcement of Department Rules and Regulations pertaining to preparedness for court. All such actions were done for the purpose of punishing or inhibiting plaintiff's constitutional right of free speech to attend a public trial and freedom of assembly.

15. As a direct and proximate consequence of the denial of plaintiff's First Amendment rights, plaintiff suffered economic loss which was not recompensed by his reinstatement as an officer following the successful appeal of the unfounded charges, and has further suffered mental anguish, emotional distress, and claims all compensatory damages allowable under 42 U.S.C. Section 1983. Plaintiff further avers that the acts and conduct of the defendant Deutsch, acting individually and as official policy maker of the City, were deliberate, oppressive, and malicious, for which plaintiff claims punitive damages.

WHEREFORE, premises considered, plaintiff demands judgment against the defendants, separately and severally, in an amount exceeding $500,000.00 plus costs, attorney's fees, interest, and all such other sums as are permitted under the law.

COUNT II

Due Process

16. Plaintiff adopts and realleges paragraphs 1 through 15 as if fully set forth herein.

17. Plaintiff avers that the acts and conduct of defendant Deutcsh, acting individually and as official policy maker of the City of Birmingham, as hereinabove alleged, were done arbitrarily, capriciously, and irrationally and done with the intent and purpose to intimidate and harass

plaintiff for engaging in constitutionally protected activities and together and separately constitute a violation of plaintiff's substantive due process rights.

18. Plaintiff's procedural due process rights have been violated by defendants in denying plaintiff a fair and impartial investigation and in the defendants' use and employment of the investigation procedures as a means of intimidating, coercing, and otherwise retaliating against plaintiff for his exercise of First Amendment rights including the right of free speech, freedom of assemblage, and right to petition for redress of violations of his rights.

19. Plaintiff avers that the actions of the defendants were done intentionally and maliciously and with knowledge or reckless indifference to the consequences, including the fact that plaintiff would suffer economic harm and emotional distress, so that punitive damages are proper.

WHEREFORE, premises considered, plaintiff demands judgment against the defendants, separately and severally, in an amount exceeding $500,000.00 plus costs, attorney's fees, interest, and all such other sums as are permitted under the law.

COUNT III

State Law Due Process Claim

20. Plaintiff adopts and realleges paragraphs 1-19 as if fully set forth herein.

21. Plaintiff claims a violation of state constitutional rights as provided by Article I, Section 13 of the Constitution of Alabama, 1901, which provides:

> "That all courts shall be open; that every person, for any injury done him in his lands, goods, person, reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."

22. Plaintiff avers that the defendants, by and through their arbitrary, capricious, and irrational acts and conduct as hereinabove alleged, denied plaintiff his substantive due process rights as established under Alabama law and judicial authority, to-wit: *City of Birmingham v. Community Fire District*, 336 So.2d 502 (Ala. 1976).

23. Plaintiff avers that the actions of the defendants were done intentionally and maliciously with knowledge or reckless indifference to the consequences, including the fact that plaintiff would suffer economic harm and emotional distress, so that punitive damages are proper.

24. The acts and conduct of the defendants as hereinabove alleged have violated the rights of the plaintiff as are guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. Additionally, they violate the rights of the plaintiff guaranteed by the Constitution of the State of Alabama.

WHEREFORE, THE PREMISES CONSIDERED, plaintiff seeks the following relief:

A. Appropriate declaratory and injunctive relief against defendants, whereby defendants are enjoined from taking further action in violation of plaintiff's rights.

B. Appropriate monetary damages, compensating plaintiff for all damages as a result of the violation of plaintiff's rights. Plaintiff further seeks actual and punitive damages against defendants.

D. All costs of this action, including reasonable attorneys' fees.

E. Any other and different relief to which plaintiff may be entitled.

/s/ M. Clay Ragsdale
M. CLAY RAGSDALE
Bar No. 422-88-0594
Farley Building, Suite 550
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(205) 251-4775

PLAINTIFF DEMANDS TRIAL BY JURY.

/s/ M. Clay Ragsdale
M. CLAY RAGSDALE

[Filed Jan. 12, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number: CV 92-AR-2339-S

SCOTT THOMAS MORRO,
Plaintiff,

VS.

CITY OF BIRMINGHAM, AL.,
A Municipal Corporation, and
ARTHUR DEUTCSH, individually and
in his capacity as
Chief of Police of the City of Birmingham,
Defendants.

ANSWER

Comes now the Defendants, City of Birmingham, a municipal corporation under the laws of the State of Alabama, and Arthur Deutcsh, Individually and in his Official Capacity as Chief of Police of the City of Birmingham, and as Answer to the Amended Complaint filed in the above-styled cause state the following:

1. Defendants deny that the jurisdiction of this Court has been properly invoked.

2. Defendants admit the averments of Paragraph Two except as to whether defendant Deutcsh was, at all times relevant to this matter, the Chief of Police and deny that he can be sued in that official capacity.

3. Defendants deny the averments of Paragraph Three of the Amended Complaint.

4. Defendants admit the averments of Paragraph Four of the Amended Complaint.

5. Defendants admit that Plaintiff was disciplined for being unprepared to prosecute a criminal case in Birmingham Municipal Court. Defendants deny Plaintiff's allegation that he was punished for attending a public trial or that Plaintiff was punished in order to deter anyone from discussing matters of public concern.

6. Defendants deny the material allegations of Paragraph Six of the Amended Complaint.

7. Defendants deny the material allegations of Paragraph Seven of the Amended Complaint.

8. Defendants deny the material allegations set out in Paragraph Eight of the Amended Complaint. Defendants admit that Plaintiff was suspended for a period of thirty (30) days.

9. Defendants deny the material allegations set out in Paragraph Nine of the Amended Complaint.

10. Defendants deny the material allegations set out in Paragraph Ten of the Amended Complaint.

11. Defendants deny the material allegations set out in Paragraph Eleven of the Amended Complaint.

12. Defendants restate and adopt, as if fully stated herein, the responses, denials and admissions previously stated regarding the material allegations contained in Paragraphs One through Eleven of the Amended Complaint.

13. Defendants deny the material allegations set out in Paragraph Twelve of the Amended Complaint.

14. Defendants deny the material allegations set out in Paragraph Fourteen of the Amended Complaint.

15. Defendants deny the material allegations set out in Paragraph Fifteen of the Amended Complaint.

16. Defendants restate and adopt, as if fully stated herein, the responses, denials and admissions previously stated regarding the material allegations of Paragraphs One through Fifteen of the Amended Complaint.

17. Defendants deny the material allegations set out in Paragraph Seventeen of the Amended Complaint.

18. Defendants deny the material allegations set out in Paragraph Eighteen of the Amended Complaint.

19. Defendants deny the material allegations set out in Paragraph Nineteen of the Amended Complaint.

20. Defendants restate and adopt, as if fully stated herein, the responses, denials and admissions previously stated regarding the material allegations of Paragraphs One through Nineteen of the Amended Complaint.

21. Defendants deny the material allegations set out in Paragraph Twenty-One of the Amended Complaint.

22. Defendants deny the material allegations set out in Paragraph Twenty-Two of the Amended Complaint.

23. Defendants deny the material allegations set out in Paragraph Twenty-Three of the Amended Complaint.

24. Defendants deny the material allegations set out in Paragraph Twenty-Four of the Amended Complaint.

25. Defendants deny that Plaintiff is entitled to any of the relief he has requested.

AFFIRMATIVE DEFENSES

26. Defendants aver that the Plaintiff fails to state a claim for which relief can be granted.

27. Defendants aver that, under the circumstances presented, in spite of any other factors relating to Scott Morro's employment, the Defendants would have taken the same action regarding his employment, and specifically invoke the *Mt. Healthy* defense.

28. Defendants aver that all of its actions with respect to the employment of Scott Morro were made on the basis of rational factors and were not a pretext, nor were they arbitrary or capricious, nor for any unconstitutional purpose.

29. To the extent that the complaint alleges a claim against the City of Birmingham for punitive damages, the City contends that such claim is barred by the holding in *City of Newport v. Facts Concerts,* 453 U.S. 247 (1981).

30. Defendants aver that all actions taken by it in regard to the Plaintiff's employment were necessary for the effective operation and management of the defendant's business.

31. Plaintiff fails to state a claim against the Defendant, the City of Birmingham, for which he is entitled to relief.

32. Defendant, Arthur Deutcsh, raises the defense of Qualified Immunity.

/s/ Demetrius Newton
DEMETRIUS NEWTON
City Attorney
State Bar # 416-32-9763

/s/ John M. Edens
JOHN M. EDENS
Assistant City Attorney
State Bar # 240-82-4643

/s/ Thomas Bentley, III
THOMAS BENTLEY, III
Assistant City Attorney
State Bar # 419-72-4055

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[Filed Apr. 20, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Civil Action Number: CV 92-AR-2339-S

SCOTT THOMAS MORRO,
Plaintiff,

vs.

CITY OF BIRMINGHAM, *et al.*,
Defendants.

MOTION FOR SUMMARY JUDGMENT

Comes now the Defendants, the City of Birmingham, a municipal corporation, and Arthur Deutcsh, sued both individually and in his official capacity as Chief of Police of the City of Birmingham, and in support of this motion, Defendants show the following:

DEFENDANT CITY OF BIRMINGHAM

1. The complaint fails to state a claim against Defendant City of Birmingham for which the plaintiff is entitled to relief.

2. Plaintiff's complaint against Defendant City of Birmingham fails to allege a "policy or practice" of the City of Birmingham, to violate plaintiff's or others' constitutional rights.

3. The plaintiff's basis for liability against Defendant, City of Birmingham, is predicated solely on the doctrine of "Respondeat Superior". This may not form the basis for the liability of a municipality under 42 USC § 1983.

DEFENDANT ARTHUR DEUTCSH

1. The complaint fails to state a claim against Defendant, Arthur Deutcsh, for which the plaintiff is entitled to relief.

2. Defendant, Arthur Deutcsh is sued in both his "individual" and "official" capacities. The basis for the "Official capacity" claim is that at the time he made the employment decision regarding plaintiff, Defendant Deutcsh was the Chief of the Birmingham Police Department.

3. While Defendant Arthur Deutcsh is no longer the Chief of Police for the City of Birmingham, at the time Defendant Arthur Deutcsh made the employment decision regarding plaintiff, he was acting in that "official" capacity.

4. At that time, Defendant Arthur Deutcsh's conduct did not violate any "clearly established statutory or constitutional rights of which a reasonable person would have known". *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982); *Herren v. Bowyer,* 850 F.2d 1543 (11th Cir.1988).

5. Defendant Arthur Deutcsh was a governmental official performing a "discretionary function", and in the performance of this discretionary function, Defendant Arthur Deutcsh is entitled to "qualified immunity" from suit, for decisions which are objectively reasonable. *Rich v. City of Mayfield Heights,* 955 F.2d 1092 (6th Cir.1991); *Fraire v. City of Arlington Heights,* 957 F.2d 1268 (5th Cir.1992).

6. The complaint is devoid of facts alleging violation of the plaintiff's constitutional rights by Defendant Arthur Deutcsh, while acting in his "individual" capacity.

WHEREFORE, PREMISES CONSIDERED, Defendants, the City of Birmingham and Arthur Deutcsh, sued

in his official and individual capacities, request that this Honorable Court enter a judgment in their favor and dismiss the suit filed against them.

Respectfully submitted,

/s/ John M. Edens
JOHN M. EDENS
State Bar I.D. #240-82-4643
Attorney for Defendants
600 City Hall
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(205) 254-2369

ORAL ARGUMENT REQUESTED

[Entered and Denied Aug. 20, 1993]

[Filed Apr. 20, 1993—Entered Apr. 20, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number: CV 92-AR-2339-S

SCOTT MORRO,

Plaintiff,

vs.

CITY OF BIRMINGHAM,
a Municipal Corporation and
ARTHUR DEUTCSH,
Individually and in his Official Capacity,

Defendants.

PRE-TRIAL ORDER

A pre-trial conference was held in the above case on Tuesday, April 20, 1993, wherein, or as a result of which, the following proceedings were held and action taken:

1. *Appearances.* Appearing at the conference were:

   Plaintiff: Clay Ragsdale

   Defendants: John Edens

2. *Jurisdiction and venue.* Jurisdiction exists pursuant to 28 U.S.C. Section 1331.

3. *Consolidation.* Not applicable.

4. *Parties and trial counsel.*

PARTIES	*TRIAL COUNSEL*
Plaintiffs:	
Scott Morro	M. Clay Ragsdale
Defendants:	
City of Birmingham	John Edens Thomas Bentley
Arthur Deutcsh	Mark White

5. *Pleadings.* The following pleadings have been allowed: Complaint (as amended) on behalf of the plaintiff; answer on behalf of the defendants to each complaint. The answers filed to the original complaint suffice as answers to the amended complaints without refiling.

6. *Statement of the case.*

(a) *Agreed summary.* Plaintiff is a police office employed by the City of Birmingham who, on October 9, 1990, was suspended without pay for thirty days. Plaintiff appealed the disciplinary action to the Personnel Board of Jefferson County which appeal was successful and the suspension was reversed.

(b) *Plaintiff's positions.* Plaintiff's positions are set forth in detail in the complaint which is adopted as if fully set forth herein. In summary, plaintiff contends that the disciplinary action instituted against him was for the purpose of punishing him for attending a public trial and to deter him and other employees from associating or discussing matters of public concern. Plaintiff avers that defendant Deutcsh, acting individually and as a policy maker for the City of Birmingham, intentionally and maliciously sought to punish the plaintiff for his association with and attendance at the trial of Erica Arrington.

Said conduct was motivated by the desire to intimidate others from association with Bahakel or otherwise engaging in speech, conduct, or assemblage, relating to the arrest or trial of Arrington or the related records tampering activities of Deutcshe.

(c) *Defendants' positions.*

(1) The defendants, the City of Birmingham and Arthur Deutcsh, deny each and every material allegation of plaintiff's complaint filed in this cause.

(2) The defendants raise, as an affirmative defense, the *Mt. Healthy* defense, in that in spite of any other factors relating to the plaintiff's employment, the defendants would have taken the same action regarding his employment.

(3) The defendants state that all of their actions with respect to the employment of plaintiff were made on the basis of rational factors and were not a pretext, nor were they arbitrary or capricious, nor for any unconstitutional purpose.

(4) The defendant, the City of Birmingham, states that to the extent that the complaint alleges a claim against it for punitive damages, the City of Birmingham contends that such claim is barred by the holding in *City of Newport v. Facts Concerts,* 453 U.S. 247 (1981).

(5) The defendants state that all actions taken by them in regard to plaintiff's employment were necessary for the effective operation and management of the defendants' business.

(6) The defendant, the City of Birmingham, states that plaintiff's complaint fails to state a claim against the City upon which plaintiff is entitled to relief.

(7) The defendant, Arthur Deutcsh, raises the defense of qualified immunity.

(8) The defendants state that Arthur Deutcseh may not be sued in his "official capacity."

7. *Discovery and other pre-trial procedures.*

(a) The parties are given leave to proceed with further discovery in accordance with previous extension grant.

(b) The Standard Pre-trial Procedures specified on Exhibit A hereto are adopted as part of this order.

(c) Pending discovery motions: None

8. *Trial.* [Jury case] When the case is called for trial, the parties shall present to the court any special questions or topics for voir dire examination of the jury venire, and, to the extent the same can be anticipated, any requests for instructions to the jury (including extracts of any statutes on which instructions are requested).

ORDERED this 20th day of April, 1993, that the above provisions are binding on all parties unless modified by further order for good cause shown.

/s/ William M. Acker
United States District Judge

[Filed Apr. 5, 1995—Entered Apr. 5, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number: CV 92-AR-2339-S

SCOTT MORRO,

Plaintiff,

vs.

THE CITY OF BIRMINGHAM,

Defendant.

PRETRIAL ORDER

A pretrial conference was held in the above case on April 5, 1995, wherein or as a result of which, the following proceedings were held and action taken:

1. *Appearances*: Appearing at the conference were:

Plaintiff: Clay Ragsdale

Defendant: John Edens
Tom Bentley

2. *Jurisdiction and venue*: Jurisdiction exists pursuant to 28 U.S.C. § 1331.

3. *Consolidation*: Not applicable.

4. *Parties and trial counsel*: Any fictitious defendants are hereby DELETED. The parties before the Court are correctly named as set out below and the designated trial counsel for the parties are as set out below:

PARTIES	*TRIAL COUNSEL*
Plaintiffs:	
Scott Morro	M. Clay Ragsdale E. Ansel Strickland (Law Offices of M. Clay Ragsdale)
Defendants:	
City of Birmingham Johnny Johnson, in his official capacity as Police Chief (substituting for former Chief Deutcsh)	John Edens Thomas Bentley, III Mike Fleagle City of Birmingham Department of Law

5. *Pleadings*: The following pleadings (with modifications contained in this Order) have been allowed: Complaint (as amended) on behalf of the plaintiff; Answer on behalf of defendants.

6. *Statement of the Case*:

(a) *Agreed Summary*: Plaintiff is a police officer employed by the City of Birmingham who, on October 9, 1990, was suspended without pay for thirty (30) days. Plaintiff appealed the disciplinary action to the Personnel Board of Jefferson County which appeal was successful and the suspension was reversed.

(b) *Plaintiff's position*: Plaintiff's positions are set forth in detail in the complaint which is adopted as if fully set forth herein. In summary, plaintiff contends that the disciplinary action instituted against him was for the purpose of punishing him for attending a public trial and to deter him and other employees from associating or discussing matters of public concern.

(c) *Defendants' position*:

(1) The defendant deny each and every material allegation of plaintiff's complaint filed in this cause.

(2) The defendant raise, as an affirmative defense, the *Mt. Healthy* defense, in that in spite of any other factors relating to the plaintiff's employment, the defendant would have taken the same action regarding his employment.

(3) The defendants stated that all of its actions with respect to the employment of plaintiff were made on the basis of rational factors and were not a pretext, nor were they arbitrary or capricious, nor for any unconstitutional purpose.

(4) The defendants state that to the extent that the complaint alleges a claim against it for punitive damages, the City of Birmingham contends that such a claim is barred by the holding in *City of Newport v. Facts Concerts* 453 U.S. 247 (1981).

(5) The defendants state that all actions taken by it in regard to plaintiff's employment were necessary for the effective operation and management of the defendant's business.

(6) The defendants state that plaintiff's complaint fails to state a claim against the City upon which plaintiff is entitled to relief.

7. *Discovery and other pretrial procedures*:

(a) The parties are given leave to proceed with further discovery provided it is commenced in time to be completed by August 4, 1995.

(b) The Standard Pretrial Procedures specified on Exhibit "A" hereto are adopted as part of this Order.

(c) Pending discovery motions: None

8. *Trial*: (Jury case) When the case is called for trial, the parties shall present to the court any special

questions or topics for voir dire examination of the jury venire, and, to the extent the same can be anticipated, any requests for instructions to the jury (including extracts of any statutes on which instructions are requested). The case is set for trial at 5:00 A.M. September 18, 1995.

ORDERED this 5th day of April, 1995, that the above provisions be binding on all parties unless modified by further Order for good cause shown.

/s/ William M. Acker
United States District Judge

[Transcript of Portions of Trial Proceedings]

CONFERENCE

* * * *

[448] MR. BENTLEY: Your Honor, I don't have any objection to that. I would ask that the plaintiff dismiss Chief Johnson in his official capacity. I don't think that puts the plaintiff in any prejudicial position.

THE COURT: I don't either. It might even help you for me to tell the jury that he's moved to dismiss the case against the chief, the present chief.

MR. BENTLEY: There are a couple of other matters though, Your Honor—

THE COURT: All right.

MR. BENTLEY: —that bother me greatly. And I should have mentioned them before, but I think now is the time to mention them.

Your Honor. I do not agree that Chief Deutcsh was the final policymaker as far as discipline was concerned. I do not agree with that because his decisions were subject to review. And it's difficult under the law under *Praprotnik* to envision that a final decision maker's decisions are indeed subject to review themselves. And the final policymaker on—

THE COURT: So your view would be arguing that the final policymaker is the Personnel Board?

MR. BENTLEY: Yes, sir. And withdrawing my suggested jury instruction No. 14, which I just now saw, which someone else wrote.

[449] THE COURT: Wait a minute. I was going to give that one.

MR. BENTLEY: You probably were.

THE COURT: You probably would have caught it.

MR. BENTLEY: That's what reminded me.

THE COURT: I was going to give it grandly and stand up when I did it.

Incidentally, one reason for not giving it is your spelling. Instead of deprivations, you've got depravations. That sounds like somebody is depraved.

MR. FLIEGEL: That's the word processor.

THE COURT: I wouldn't want to call anybody at the City depraved.

MR. RAGSDALE: I was going to use that in my closing.

THE COURT: He's not charging y'all with being depraved. He's charging that he was deprived.

Well, okay. 14, I won't give 14.

But let's get back to the *Praprotnik* thing and the Personnel Board because, you know, that may be an interesting kind of question. That is in a way an argument that I'm not saying—I'm not faulting you for not having articulated it sooner before I ruled as I did on your 59(a) motion. I think that was probably the time to spring it and not after I had already ruled.

[450] But let's rethink it a minute. Let's renew or allow you to reimpose the 50(a) motion in light of the argument that Chief Deutcsh was not the final decision maker and therefore was not the City of Birmingham. Instead, the Personnel Board was.

It's sort of an interesting argument, a little bit of an anomaly—I say not just a little bit. I guess things are either an anomaly or they are not an anomaly. It's kind of like things are not just a little bit unique. They are either unique or they're not unique. But Chief Johnson has said he disagrees with the Personnel Board a good bit of the time and that he makes decisions from time to time of a disciplinary nature that are reviewed by the Personnel Board, and that it from time to time disagrees with him. I guess from time to time he agrees with it.

If you took your *Praprotnik* argument to its logical conclusion or illogical conclusion, a police chief who under the state law is the manager of the police department, he's the person who, the testimony is, conducts a disciplinary hearing, he initiates the thing, and imposes the discipline, makes a disciplinary decision, actually makes it, says you are fired or says you are suspended or says whatever he says. If he is not for the purposes of 1983 the City and instead the Personnel Board is the City,

because we know that the mayor is not for the purposes of this, we know the city [451] council is not. So it's got to be either the police chief or the Personnel Board because it's the reviewer and the final decider. So if it's the Personnel Board, then I guess this plaintiff should have sued the Personnel Board, but the Personnel Board agreed with him. So he certainly wouldn't want to be ugly and sue the Personnel Board that agreed with him. So they sued the person that they thought, or he thought, had discriminated against him or had violated his First Amendment rights.

Now, if—and let's get back to the logical or illogical conclusion of saying that the Personnel Board or saying that Deutcsh was not the decider for the City of Birmingham for 1983 purposes. A police chief, if that's true, could have absolutely impunity and the City of Birmingham could with absolute impunity could have the police chief do the most egregious things with respect to employees, punish them across the board for no reason whatsoever knowing, expecting the Personnel Board to correct it and never be subject to suit under 1983. Now, tell me why I'm wrong on that.

MR. BENTLEY: I think if there's anything wrong with that, it is this: You have said that under state law the police chief is the final decision maker. Well, the rules and regulations, the existence in fact of the Personnel Board are creations of state law. And that state law in the state of Alabama provides for a personnel board, provides for that [452] personnel board to create rules and regulations, provides for an appeal process—

THE COURT: Let me ask you—Excuse me for interrupting, but do you happen to know off the top of your head whether the City of Leeds, which is in Jefferson County, has the same relationship with the Personnel Board that the City of Birmingham does?

MR. BENTLEY: I happen to know that it doesn't because Leeds, it's for—the Personnel Board Act that applies to the City of Birmingham applies to cities in Jefferson County that are wholly within Jefferson County.

And I believe Leeds is in part in another county. I'm not sure whether it's St. Clair or Shelby.

THE COURT: It is in St. Clair, it's partly in St. Clair. I know that.

MR. DAWSON: And in Shelby. And it is under the Personnel Board now.

THE COURT: It is? The reason I ask is I've got something to share with you right quick.

Well, I don't have time. I'm going to lunch right now. I'll share it with you when I get back, but I'm going to tell you now. *Richardson v. City of Leeds* on application for rehearing and suggested rehearing en banc, a review of Judge Acker by Police Officer Richardson who sued the City of Leeds Police Department and the Chief. The Eleventh Circuit, as of [453] now, subject, of course, to change, and I doubt that there will be in this regard or probably in any other regard, equates the chief to the city. And that's why I asked the question is it under the personnel board.

Now, that the question of the *Praprotnik* expansion or application was not raised, and I'm not going to try to fool you into thinking that the big factor, a big argument, in the Eleventh Circuit had to do with who the ultimate decider was, it was assumed, it was said, everybody agreed that it was the chief who administered, that made the decision. In that case the decision was not to discipline but not to employ or reemploy. The police officer had quit, reapplied, and the chief refused to rehire. So the issue was not precisely the same.

But the question here as far as who the decider is under the law of Alabama, I think is the same. I think.

MR. BENTLEY: I don't know when they voted. Bill may have some information on it. I don't know when they became a part of the system.

THE COURT: This case could have arisen.

MR. RAGSDALE: That was in May of '93, I think, Your Honor.

THE COURT: You think that Leeds came under it in '93?

MR. RAGSDALE: I believe it—

[454] THE COURT: I wouldn't be surprised if this Richardson case didn't start before '93. Could have been, so that issue—that would have been a good reason for it not to—I'm going to check *Richardson* during the lunch hour, but I'm going to lunch right now. See you at 1 o'clock.

MR. BENTLEY: Can we resume this at that point?

THE COURT: Yes, we can.

(Lunch recess from 11:43 a.m. to 1 p.m.)

(Jury not present.)

AFTERNOON SESSION

THE CLERK: Remain seated.

THE COURT: We were still in the charge conference phase and you had something else to say.

MR. BENTLEY: Yes, Your Honor. It connects with our Rule 50 motion.

The plaintiff has offered no evidence that Chief Deutcsh's decision was, one, as a policymaker for the City of Birmingham so as to attach municipal liability under the Supreme Court's decision in *Monell*. What the evidence clearly shows in this case is that Chief Deutcsh's decision was not a final decision, was in fact a decision that was appealed, was in fact a decision that was reversed, was in fact a decision not allowed to stand, a decision which in the end had no force and no effect.

Under the law the City can only be liable—because we [455] are not here to determine the liability of Chief Deutcsh. Chief Deutcsh's liability has been determined by the Eleventh Circuit. And it said that in his individual capacity he's not liable. It gave him the defense of qualified immunity.

We are here to determine the liability of the City of Birmingham. The City of Birmingham's liability can only

be attached if the decision was one pursuant to a municipal custom, practice, or policy. The policy can be only one if he's trying to say that Chief Deutcsh's decision was the policy, then he's going to have to establish Chief Deutcsh as a policymaker. The evidence that he has presented shows that Chief Deutcsh had no policy, the final policymaking authority in this case.

THE COURT: Let me interrupt you. During the lunch hour I looked at *Richardson v. Leeds,* and I had it backwards. It was the mayor who made the decision actually not to rehire. So I was wrong when I told you what the facts were in that case. I don't think it makes that much difference, but I thought I'd just straighten the record out there.

MR. BENTLEY: I looked at it too. And I take it that possibly on the other issue we were talking about, I think it was possibly before they came under the Personnel Board.

THE COURT: Before they came under the Personnel [456] Board, before the city did?

MR. BENTLEY: Yes, sir.

And I think there are several things in the evidence before the Court that suggests that Deutcsh was not a policymaker so as to attach municipal liability.

One, you have the opinion and the decision of Ann Arnold, or Ann Elliott, reversing Deutcsh's decision. You have evidence from the plaintiff that his suspension was rescinded, the 30 days was reinstated, he was compensated, given back pay, in effect, as the Court has said, had a 30-day vacation. Also Chief Johnson has testified that he is also chief of police now and that he makes decisions on discipline but they are not final decisions. In the instance where they are over five days or if the cumulative total of the discipline is more than 10 days in 12 months, that those decisions are appealable to the Personnel Board. And it's the Personnel Board that has the final decision making authority in the discipline in those cases.

Municipal liability cannot attach in this case, and the defendants are entitled to be relieved.

THE COURT: In the case of Lassiter, is that her name?

MR. BENTLEY: Alabama A & M?

THE COURT: No. The other police officer?

MR. DAWSON: Lockhart.

[457] THE COURT: Officer Lockhart, she was a probationary officer and she was terminated. Was that reviewable by the Personnel Board?

MR. BENTLEY: That was not reviewable by the Personnel Board.

THE COURT: So that it was it was a final decision by the police chief, nonrenewable?

MR. BENTLEY: It was appealable to the mayor.

THE COURT: So in that case it would be the mayor, sort of like in the City of Leeds, he would be the final decision maker.

MR. BENTLEY: Exactly. In either case, the final decision making is out of Chief Deutcsh's hands.

THE COURT: Well, I get back to the anomaly, or the problem, of where that leads or where that could lead. And I'm not talking about the City of Leeds. I'm talking about l-e-a-d-s.

It seems to me to lead to the possibility of a Catch-22 or an employee who, if he is, if there is a mal-motive by the police chief who you say does not have final authority, then but for the possibility, small though it may be, of getting, penetrating the qualified immunity defense, that's all he's got.

MR. BENTLEY: That's really the case. And fair or unfair as that is—

[458] THE COURT: Well, of course, I'm not the final arbiter of just what, quote, fairness or just, quote, morality public or private. I'm here to try to decide what the law of the United States is and to do the best I can to apply it. And you may be right, but it will take the Eleventh Circuit to explain it to me. You've done a good

job of trying to explain it to me, and I understand your position. But in all due respect, I don't agree with it.

And that's why I've already ruled your Rule 50 motion because of what you say now was true at the end of the plaintiff's case just as it is now. Everything you've said was apparent at that time and it's apparent now. And if you had been right, if I had thought you were right then, I should have saved you the time and trouble of putting on your evidence.

Anyway, overruled. And we'll move on to your 40 minutes to the side. You've got your hands up again.

MR. BENTLEY: No, sir. Not about what you have ruled on.

THE COURT: All right.

MR. BENTLEY: It's about another thing that I think we need to clear up and have some guidance from the Court.

THE COURT: All right.

* * * *

[Filed Mar. 29, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number: CV 92-AR-2339-S

SCOTT MORRO,
Plaintiff,

vs.

THE CITY OF BIRMINGHAM, *et al.*,
Defendants.

DEFENDANTS' RENEWED MOTION FOR ENTRY OF JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY MOTION FOR A NEW TRIAL

Comes now the City of Birmingham, defendant in the above-entitled action and respectfully moves the court, pursuant to Federal Rules of Civil Procedure, Rule 50, to reopen the judgment entered by the Court on March 21, 1996 and enter judgment as a matter of law in favor of defendant City of Birmingham. Defendant requests that the Court leave undisturbed that part of its Order of March 21, 1996 which dismissed the plaintiff's claims against Chief Johnnie Johnson in his official capacity as Chief of the Birmingham Police Department. Alternatively, the defendant requests entry of an Order by the Court granting it a new trial in this cause.

As grounds for the requested relief defendant states and shows unto the Court the following:

1. At the close of all the evidence presented at the trial there existed no legally sufficient evidentiary basis for a

reasonable jury to find for the plaintiff against defendant City of Birmingham.

2. Plaintiff failed to adduce evidence that the deprivation he claimed the City was liable for was caused or occurred pursuant to a municipal policy as required for the imposition of municipal liability by *Monell v. Department of Social Services,* 436 U.S. 658 (1978); *Wideman v. Shallowford Community Hospital, Inc.,* 826 F.2d 1030 (11th Cir. 1987). In particular, the evidence clearly, precisely and without controversy showed that former Birmingham Police Chief Arthur Deutcsh was not and could not, as a matter of law, be found to be a policy maker for the City of Birmingham on disciplinary matters under the holding of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Alabama and the law of the State of Alabama which those holdings aforementioned require the Court to look to in determining who is a policy maker (including any local ordinances or regulations which are applicable. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Manor Healthcare Corp. v. Lomelo,* 929 F.2d 633 (11th Cir. 1991); *Martinez v. City of Opa-Locka, Florida,* 971 F.2d 708 (11th Cir. 1992; *Hill v. Clifton,* 74 F.3d 1150, (11th Cir. 1996); *Bahakel v. City of Birmingham,* No. CV90-JT-1834-S [(N.D. AL March 10, 1992, unpublished memorandum opinion of Judge Propst, affirmed without opinion 986 F.2d 507 (11th Cir. 1993), *en banc* reh. den. 992 F.2d 330 (11th Cir. 1993)]. See Appendices containing Act No. 248, H.580, of the Alabama Legislature of 1945 p. 376 as amended (the Jefferson County Personnel Board Enabling Act), The Jefferson County Personnel Board Rules and Regulations, Act No. 452 of the Alabama Legislature of 1955, as amended (excerpts from the Mayor-Council Act- establishing the form of government adopted by the

citizens of the City of Birmingham), Supplemental Personnel Rules and regulations adopted by the City of Birmingham.

3. The evidence in this case clearly, precisely and without controversy showed that the personnel disciplinary decisions of the Chief of the Birmingham Police Department (both Chief Deutcsh and Chief Johnson) were subject to review by the Jefferson County Personnel Board and in come cases by the Mayor of the City of Birmingham.

4. The plaintiff adduced no substantial evidence from which a reasonable jury could find that any violation or deprivation of his First Amendment rights occurred.

5. The system employed by the Northern District of Alabama for empaneling juries violates the Jury Selection and Service Act, 28 U.S.C. § 1861, *et seq.* by causing the systematic under-representation of African-Americans in its venires.

6. The selection of the jury venire in the instant case from the remaining available jurors on the March 4, 1996 Jury List rather than the larger (and usual) March 18, 1996 Jury List operated to cause absolutely no representation of African-Americans on the venire from which the Jury in the instant case was selected.

7. The Court's ruling disallowing the City's challenge to two jurors who stated that they had strong feelings about the case which were obviously biased against the City was erroneous and prejudicial to the City.

8. The City was substantially prejudiced by the admission into evidence of a memorandum by Chief Deutcsh to members of the Birmingham Police Department. This document was not relevant and certainly if it was deemed to be relevant it's probative value was substantially (overwhelmingly) outweighed by its tendency toward unfair prejudice, confusion of issues, misleading the jury and a waste of time. Federal Rules of Evidence, Rule 403.

9. The City was substantially prejudiced by the Court's ruling disallowing the testimony of Birmingham Police Officer John Crane who would have testified that he heard the plaintiff state to others that he would refuse to testify in court. This statement by plaintiff was relevant, probative and although obviously prejudicial to the plaintiff, much more so probative as to not have its probative value substantially outweighed by any danger of unfair prejudice. Federal Rules of Evidence, Rule 403.

10. The City was substantially prejudiced by the Court's ruling admitting into evidence the report of the hearing officer. Although relevant, the report's admission in its entirety resulted in unfair prejudice, confusion of issues (the issue was what was reasonable for Deutcsh, not what Ann Arnold thought about the evidence when she heard it) and misleading the jury (who may have thought that Ann Arold's findings conclusively showed that Deutcsh could have had no reasonable basis and proper motive in disciplining the plaintiff). Federal Rules of Evidence, Rule 403.

11. The City was substantially and unfairly prejudiced by the failure of the Court to advise the jury that Deutsch had been dismissd from the case.

12. The City was substantially and unfairly prejudiced in what it could argue to the Jury concerning Deutsch's dismissal from this case by the Court's announcement of its intention to read from its memorandum opinion statements which would have been unfairly prejudicial to this defendant and misleading and confusing to the Jury. Federal Rules of Evidence, Rule 403.

13. The City was substantially and unfairly prejudiced by the failure of the Court to instruct the Jury on the basis of municipal liability under 42 U.S.C. § 1983.

14. The Court's instructions to the Jury seem to indicate that the basis of municipal liability is the legal doctrine of *respondeat superior*, this doctrine cannot be the basis

of the City's liability in a § 1983 case. *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).

WHEREFORE, the defendant respectfully requests the Court to set aside and vacate its previous entry of judgment for plaintiff and enter an order granting judgment in favor of this defendant and Johnnie Johnson, Jr. in his official capacity as Chief of the City of Birmingham Police Department. Alternatively defendant requests this Court to set aside and vacate the previous entry of judgment for plaintiff and enter an order granting defendant a new trial. The undersigned also requests that the Court afford defendant an opportunity to submit a brief and materials pertinent to the legal questions herein presented and to present oral argument in support of this motion.

Respectfully submitted:

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[Entered and Denied Apr. 12, 1996]

Supreme Court, U.S.
FILED
FEB 19 1998
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No. 97-878

In The

Supreme Court of the United States

October Term, 1997

CITY OF BIRMINGHAM, ALABAMA,

Petitioner,

vs.

SCOTT THOMAS MORRO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX

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STATEMENT OF THE CASE

Morro brought suit against The City of Birmingham ("The City") for the violation of his rights under the First Amendment of the United States Constitution. In 1990, Morro attended as a spectator the trial of Erica Arrington, the daughter of the Mayor of Birmingham. His attendance at this public trial, which represented a show of support for a fellow officer, was viewed as a demonstration of disrespect for the Mayor. *See Morro v. City of Birmingham*, 926 F. Supp. 1033, 1035 [34a].[1] As a result, the Police Chief of Birmingham, Arthur Deutcsh, ordered the suspension of Morro for thirty days without pay. However, the stated reason for the suspension was that Morro had deliberately been unprepared to testify as an arresting officer in another matter, implying that Morro had obstructed justice. Morro's suspension was effective immediately and received widespread attention throughout the police department humiliating Morro and causing considerable damage to his reputation.

The order of suspension was not subject to any appeal or review procedure before having operative effect; instead, Morro's only recourse was with the Jefferson County Personnel Board, a body wholly separate from the City, which hears appeals from personnel decisions. Because the appeal procedures did not interrupt the operation of the suspension, Morro served out the entire thirty day term without pay. The Personnel Board later issued a decision "rescinding" the order of suspension and awarding back pay; however, the Board does not have the power to award compensatory damages for mental anguish, humiliation, or damage to reputation.

The City participated in two pretrial conferences during which the District Court formulated the issues for trial. The

---

1. The City has never contested that attendance at this trial was an activity protected by the First Amendment. [All references to Petitioner's Appendix appear in brackets.]

City was under the duty to identify those issues which were to be tried; *Monell* or any related theory was not identified by the City in the pretrial proceedings or orders as a contested matter. 926 F. Supp. at 1041. [46a].[2]

At the three day trial, Morro proffered three witnesses whose testimony would have shown that the City and the Chief of Police engaged in a pattern and practice of retaliation in response to similar First Amendment activities. This proffer was objected to by the City on the basis of relevancy. The District Court explicitly stated his understanding, derived from the pretrial proceedings, that the City had conceded its liability for the chief's conduct (the *Monell* issue). The District Court made a direct inquiry to the City's counsel to state whether this understanding was correct. *Morro v. City of Birmingham*, 117 F.3d 508, 511-12 [6a]. The City communicated its assent by remaining silent as the District Court sustained the objection and barred Morro's witnesses from testifying. Morro, believing any doubt about the *Monell* issue had been resolved, rested his case without having presented any pattern and practice witnesses. The City made a Rule 50 motion making no reference to *Monell* or otherwise attempting to distance itself from the chief as the final policymaker.

---

2. The City contends that by briefly referencing *Monell* type issues in its initial motion to dismiss in 1992 and again in a motion for summary judgment in 1993, it could not have concealed the matter during the issue formulation process of the pretrial conference occurring in 1995. It is this very type of argument that pretrial issue formulation is designed to foreclose. Adversaries and the court are not obliged to search years of court filings for oblique references in shotgun pleadings and long forgotten motion papers to ascertain the triable issues. Nor can counsel safely avoid their obligation to identify contested matters by hiding them from view behind general denials to "each and every material allegation of plaintiff's complaint filed in this cause". [81a].

The City presented its witnesses; no evidence was offered by the City relative to the authority of the Personnel Board, the scope of the Chief's authority or other matters probative to the *Monell* issue. The City rested, the evidence was closed and the City renewed its Rule 50 motion, again making no reference to the *Monell* issue.

The case proceeded to the charge conference. The City presented a requested instruction to the District Court which read:

> You are instructed that the Chief of Police was an official whose acts constitute final official policy of the City of Birmingham.

117 F.3d at 512 [7a]. The City abruptly reversed its position, withdrew the affirmative charge which confirmed its earlier concession of the *Monell* issue, and raised for the first time in the trial the argument that the chief was not an official whose acts constituted final official policy of the City.

Following trial, the City renewed its Rule 50 motion including arguments based on *Monell*. The District Court issued a lengthy decision addressing the unfair surprise generated by what it termed "The Belated *Monell* Defense". 926 F. Supp. at 1036 [35a]. The District Court determined that the issue had not been preserved by proper identification at pretrial, and the City's conduct in "concealing" the issue estopped it from relying on *Monell*. 926 F. Supp. at 1041 [45a-46a]. The City appealed to the Eleventh Circuit but did not challenge the District Court's application of judicial estoppel even though that was a principal underpinning of the District Court's ruling. (*See* Appendix A, City's Brief to Court of Appeals). It was only after the panel of the Eleventh Circuit affirmed the decision of the District Court did the City first challenge, in its Suggestion for Rehearing En

Banc, the discretionary findings of the District Court that the issue was not properly preserved.

The Petitioner in its Statement of the Case opines that the City could not be liable "on a proper application of governing principles". [note 1, 3]. Morro disputes this and contends that the Eleventh Circuit's suggestion that the City probably would have prevailed had it preserved the issue is erroneous. But because the City's concessions at the pretrial conferences and at trial dispensed with this issue, there was no need nor opportunity for Morro to develop a complete record from which the issue could have been properly adjudicated. As a result the Court of Appeals did not determine this issue; its opinion references it only in terms of what "probably" would have occurred had the issue been raised. 117 F.3d 514-15 [12a-13a].

REASONS FOR DENYING THE WRIT

I.

THE BASIS FOR THE PETITION WAS NOT TIMELY RAISED ON APPEAL TO THE COURT OF APPEALS.

The issue on which the petition is premised was not raised by the City to the District Court nor to the Court of Appeals until the Suggestion for Rehearing En Banc. A careful examination of the City's principal brief (no reply brief was filed) to the Court of Appeals will not reveal any reference to the issue which they now contend to be one having important ramifications; no mention of "affirmative defense," "waiver," "judicial estoppel," "burden of proof," the effect of the pre-trial conferences and orders, the District Court's description of *Monell* as a "defense", nor to the case principally relied on by the petitioner, *Pacific Indemnity Co. v. Broward County*, 465 F.2d 99 (5th Cir. 1972), is to be found. (*See* Appendix A, City's Brief to Court of Appeals).

The District Court issued its extensive opinion on the City's Rule 50 motion on April 12, 1996 (with addendum to the opinion dated April 17, 1996) which included the lengthy section entitled "The Belated *Monell* Defense". The District Court set out in detail the circumstances supporting his conclusions that the Monell "defense" had been "concealed", that the City's conduct at trial and pretrial formed the basis of judicial estoppel, and that the City had affirmatively conceded *Monell*. 926 F. Supp. 1036-37 [35a-46a]. It described the consequences of the City's late attempt to raise *Monell*, and how prejudice and unfair surprise would result by allowing the belated assertion of the issue after the City had used its concession to secure the exclusion of Morro's witnesses. 926 F. Supp. 1040-41 [45(a)-46(a)]. Despite clearly being a primary basis of the District Court's ruling, the City did not challenge it on appeal. The City said nothing about estoppel, concessions, the pretrial order, whether the trial court abused its discretion in refusing to consider the belated contention, or why it should be allowed to benefit from the concealment of the issue at trial. (*See* Appendix A). Yet now the City urges this Court to accept its petition arguing that the Court of Appeals ruling implicates the high degree of importance essential to trigger the application of the United States Supreme Court's scarce resources. Had this issue occupied such a position of importance, it should have been timely raised below.

The failure to timely raise this challenge on appeal is fatal to the City's petition for writ of certiorari. Little justification for certiorari jurisdiction exists over a Court of Appeals determination of the discretionary ruling of a trial court. Where the argument is not made in the first instance to the Court of Appeals, the issue is dead. Even in the Petition, the City relegates its concession and the basis of the District Court's finding of estoppel to a footnote, and it wholly fails to mention that the District Court, in open court, excluded Morro's witnesses

because the City conceded that "under *Pembaur* and *Prapotnik* and *Jett* [the chief] was the City." 117 F.3d 512 [7a]. (*See* footnote 2, Petition p. 1). It also fails to mention that, or explain why, all of the issues it now argues were not timely raised and have never been briefed before in this case. The Suggestion for Rehearing, in which these issues first surfaced, was summarily rejected.

Rather than address an issue of importance to jurisprudence, the City wants relief from, or the benefit of, a strategic tactic it elected at the trial court level. Certiorari should be refused where the petitioner conceded an issue at trial, obtained a material benefit from the concession, was denied the opportunity to reverse its position because of demonstrated prejudice to its adversary, and failed to challenge the District Court's ruling on appeal. Despite the spin placed on the issues by the Petitioner, any review of this matter will ultimately devolve to whether the District Court abused its discretion in refusing to allow the City to reverse its position and escape the consequences of concessions it made as the issues were formulated and tried.

II.

THE DECISION BELOW IS NOTHING MORE THAN THE AFFIRMANCE OF A DISTRICT COURT'S DISCRETIONARY RULINGS RENDERED AS PART OF ITS ROLE IN FORMULATING ISSUES TO BE TRIED; AS SUCH, IT CARRIES NO WEIGHTY CONSIDERATIONS JUSTIFYING THE EXERCISE OF CERTIORARI JURISDICTION.

The decision of the Court of Appeals does not rest on constitutional principles nor is it one on which the different circuits disagree. It has, in effect, little precedential application because it involves appellate review of the discretionary decisions of the District Court rendered during the course of its management of the case.

The District Court, after presiding over two pretrial hearings and the trial of the case, during which it supervised the formulation of the issues, determined that the City had conceded the *Monell* issue. Whether characterized as an element of the plaintiff's claim or as an affirmative defense, any issue may be waived or conceded by either party. The comments to Rule 16 Fed. R. Civ. P. give guidance:

> Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue for the court, the right to have the issue tried is waived.

The Court of Appeals refused to interfere with the District Court's exercise of its discretion and affirmed.

Rather than hinging on the characterization of *Monell* limitation on municipal liability as a defense or an element of the plaintiff's claim, the decisions of the District Court and the Court of Appeals rest on the interpretation of the pretrial order and, more importantly in this case, the conduct of the City's trial counsel during the trial of the case. The *Monell* issue first surfaced at trial when Morro proffered three witnesses whose testimony would have proven custom and practice.[3] The City objected on the basis of relevancy prompting the District Court's inquiry to the City:

> Well, is it not conceded from the pre-trial, is my

3. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (n.10), 106 S. Ct. 1292, 1299, 89 L. Ed. 2d 452 (1996) holding:

> A § 1983 plaintiff thus may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers if able to prove that the challenged action was pursuant to a state "custom or usage."

> recollection of this case that the City of Birmingham, as is true of most if not all municipalities, has as its decision maker ultimately with respect to police command decisions the chief, so that we're not talking about and the defendant is not attempting to distance itself from whatever it was that Chief Deutcsh did or didn't do that might or might not constitute a violation of a constitutional right of the plaintiff because under *Pembaur* and *Prapotnik* and *Jett* he was the City.
>
> The question then is not — and there's no requirement on the plaintiff in this case, is there, to prove that this man, the chief, did in fact exercise the authority in other instances, whether rightly or wrongly, that he exercised here? It's the City. He was the City. And I think the city concedes that.

117 F.3d at 512 [6a]. The Court of Appeals then noted:

> The City did not take its next available opportunity to correct the District Court's observation that it had conceded that the chief was the final policymaker. Instead, the City adhered to its relevancy objection despite the District Court's stated understanding that the objection was premised upon a concession of the chief's final policymaker status.

117 F.3d at 512 [7a].

The City did not voice disagreement in response to the District Court's observation because the City apparently agreed. For example, the City did not raise the *Monell* issue in its Rule 50 motion at the close of Morro's case nor at the close of all evidence; it submitted a jury instruction to the court at the

beginning of the charge conference which affirmatively charged the *Monell* issue out of the case. 117 F.3d at 512-13 [7a-8a]. Only when the charge conference was underway did the City reverse its position, withdraw its requested affirmative charge, and reopened argument on the Rule 50 motion by stating:

> There are a couple of other matters though, Your Honor —
>
> The Court: All right.
>
> [Counsel]: — that bother me greatly. *And I should have mentioned them before*, but I think now is the time to mention them.

[83a].

The Court of Appeals followed established authority giving the trial court discretion to effectively manage the cases before it, citing *Hodges v. United States*, 597 F.2d 1014 (5th Cir. 1979); *Santiago v. Lykes Bros. S.S. Co.*, 986 F.2d 423 (11th Cir. 1993); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841 (11th Cir. 1991); *Braswell v. ConAgra, Inc.*, 936 F.2d 1169 (11th Cir. 1991); *Lexington Ins. Co. v. Cooke's Seafood*, 835 F.2d 1364 (11th Cir. 1988). By remaining silent in the face of a direct inquiry from the District Court, the City successfully prevented the introduction of evidence which would have firmly established the "custom and usage" method of demonstrating municipal liability. Having secured this tactical advantage, the City waited until after all evidence was in to maintain that Morro had failed to present sufficient evidence from which municipal liability could be established. It was well within the District Court's discretion to deny the City the benefit of what the Court of Appeals described as an "ambush". 117 F.3d at 511-12 [note 3, 6a]. It was manifestly appropriate for the Court of Appeals

to refuse to disturb this exercise of discretion; given the complete absence of any argument that the District Court had abused its discretion, erroneously treated *Monell* as a defense, misinterpreted its pretrial orders, or incorrectly applied the doctrines of waiver or estoppel, the Court of Appeals could have reached no other conclusion.

The Court of Appeals hesitancy to substitute itself for the District Court on matters related to the formulation of issues and the enforcement of pretrial orders is based on sound policy as well as precedent. The District Court presides over pretrial conferences where counsel meet face to face with the Court to crystallize the issues for trial. Trial courts routinely demand stipulations and concessions, and the obligation is on counsel to identify contested matters. Typically, a District Court will question counsel: "What are the contested issues?" The issue formulation process would be rendered ineffective if counsel were permitted to preserve all issues by responding: "General denial."

Here the District Court presided over two pretrial conferences attended by the same attorneys who tried the case. He saw and heard counsel for the City as the issues were formulated, and he confirmed at trial what appeared firmly understood when he stated: "He [Deutcsh] was the City. And I think the city concedes that." If the City believed that this implicated important burden of proof issues relating to the characterization of *Monell* as a defense or an element of the plaintiff's case, or that the District Court and Morro were mistaken about the issues being tried, why did it remain silent? The Court of Appeals refused to allow this "sort of ambush". 117 F.3d at 516 [note 3, 16a].

The only aspect of the Court of Appeals' decision relating to anything other than the review of discretionary decisions of

the District Court are references as to what its decision might be if it were presented with the final policymaker issue. The petitioner's remark to the effect that the Court of Appeals was "undoubtedly" correct regarding its prediction of the outcome of the case had the City not conceded the *Monell* issue jumps the gun. (*See* Petition, footnote 1, page 3.) First, the act of a final policymaker is not the only path to municipal liability; the City's liability would have also been established had Morro been permitted to present testimony reflecting the custom and practice of the City. *See* 117 F.3d at 516, n.3 [16a]. This evidence was excluded because the City conceded that its chief of police was the final policymaker for purposes of "*Pembaur, Paprotnik,* and *Jett*". 117 F.3d at 511-12 [6a]. Moreover, the City's concession of the final policymaker issue dispensed with the necessity or opportunity for the District Court (and the Court of Appeals) to determine on the basis of a complete record the liability of the City under either the final policymaker or custom and usage approach. There was simply no need for Morro to present evidence or argument about the role and meaningfulness of the Personnel Board review and whether, under state law, the decision of the chief of police satisfied *Monell*; the City had agreed that this was not an issue.

Nevertheless, it is noteworthy that the evidence demonstrated the absence of meaningful review available to protect Morro and those like him from retaliatory conduct from City policymakers. Evidence was adduced showing conduct by the official policymaker of the City over matters relating to police personnel activities that produced immediate adverse consequences to one exercising his First Amendment rights. The jury found that Morro's suspension was a result of Morro's exercise of his First Amendment rights and rejected as a pretext the "unpreparedness" charge. The Personnel Board review process did not and could not intercede and protect Morro from the mental anguish, humiliation and injury to his reputation he

suffered during the suspension period; it only has the power to rescind an order of suspension that had already been enforced and award back pay.

Much like judicial review, the Personnel Board is separate from the City and review is conducted after the fact. The suspension, being the final act of the City, was effective immediately and Morro served out the full term of his suspension without pay while the Personnel Board appeal process was conducted. The jury heard testimony of the mental anguish and lasting humiliation he suffered while under suspension and also, without objection, of the continuing adverse employment action Morro suffered for years after the suspension. 926 F. Supp. at 1036, 1042 [37a-38a, 48a]. The jury's award of $150,000, the amount of which has never been challenged, illustrates the severity of the injury not redressable by Personnel Board review. While some municipalities may have procedures that review adverse employment decisions before the consequences take effect thereby preventing injury, City employees have no such preventive remedy when faced with a decision of the final policymaker. The Personnel Board to which Morro appealed his suspension addresses such matters *post facto* and cannot enjoin or stay the policymaker's decision. But because the City conceded this issue, it was not litigated, and comments as to what "probably" would have been the outcome obviously rise only to the level of dictum, not an "undoubtedly" correct interpretation of a complex issue of constitutional law.

CONCLUSION

The first time the City raised the question now presented to the United States Supreme Court was in its Petition for Rehearing En Banc to the Court of Appeals. Neither the District Court nor the panel of the Court of Appeals were timely presented with the opportunity to address the arguments now raised to this Court. Moreover, the City has failed to demonstrate that the decision below rises to the level of importance making certiorari desirable; the decision will not impact future litigation except to make trial counsel more aware of the importance of issue formulation to the orderly management of a case. For these reasons, the writ should not issue.

Respectfully submitted,

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APPENDIX

APPENDIX A — BRIEF OF CITY OF BIRMINGHAM (APPELLANT) TO THE COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NO: 96-6445

SCOTT MORRO,

APPELLEE,

vs.

THE CITY OF BIRMINGHAM,

APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
CASE NUMBER: CV 92-AR-02339-S

BRIEF OF APPELLANT

* * *

CERTIFICATE OF INTERESTED PERSON AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies that the following have an interest in the outcome of this case:

(a) Arrington, Richard Jr. — Mayor, City of Birmingham

(b) Bell, Roosevelt — Councillor, City of Birmingham

Appendix A

(c) Bell, William — Councillor, City of Birmingham

(d) Bentley, Thomas, III — Assistant City Attorney
Counsel for Appellant

(e) Blake, Dr. Jimmy — Councillor, City of Birmingham

(f) Blankenship, Eddie — Councillor, City of Birmingham

(g) City of Birmingham — Defendant/Appellant

(h) Acker, Jr., William M. Honorable — United States
District Judge

(i) Coleman, Linda — Councillor, City of Birmingham

(j) Daniel, Linda — member Jefferson County Personnel Board

(k) Davis, E. Byron — Councillor, City of Birmingham

(l) Edens, John M. — Assistant City Attorney
Counsel for Defendant/Appellant

(m) M. Clay Ragsdale — Counsel for Appellee

(n) Scott Morro — Plaintiff/Appellee

(o) Gunn, Aldrich — Councillor, City of Birmingham

(p) Jefferson County Personnel Board

(q) Johnson, James B. — member Jefferson County Personnel
Board

(r) Newton, Demetrius C. — City Attorney, City of Birmingham

(s) Payton, Ben — Executive Director Jefferson County Personnel Board

(t) Sewell, Patricia — Councillor, City of Birmingham

(u) Michael Fliegel — Assistant City Attorney
Counsel for Defendant/Appellant

ORAL ARGUMENT REQUESTED

Appellant requests oral argument in this appeal. Appellant believes that oral argument is necessary in this case although the Court has spoken numerous times on the dispositive issue in this case-qualified immunity. Appellant believes the decisional process will be aided by oral argument. This appeal is not frivolous and appellant does not believe that the court has decided a cases recently on these precise facts

* * *

CERTIFICATE OF TYPE SIZE AND STYLE

Appellant certifies that the size and style of type used in the main body of this brief is Courier 10cpi. The brief includes several appendices which are the same or different unknown type styles.

STATEMENT OF JURISDICTION

This is an appeal of a final decision of the United States District Court for the Northern District of Alabama, Southern Division. Jurisdiction of this appeal is based on 28 U.S.C. § 1291.

Appendix A

STATEMENT OF THE ISSUES

I. WHETHER THE DISCIPLINARY DECISIONS OF A CITY OF BIRMINGHAM POLICE CHIEF ARE FINAL DECISIONS WHICH MAY SUBJECT THE CITY TO LIABILITY UNDER *MONELL v. DEPARTMENT OF SOCIAL SERVICES*

II. WHETHER THERE WAS INSUFFICIENT PROOF THAT MORRO SUFFERED A CONSTITUTIONAL DEPRIVATION.

III. WHETHER ADMITTING THE PERSONNEL BOARD HEARING OFFICER'S REPORT INTO EVIDENCE WAS REVERSIBLE ERROR

IV. WHETHER THE DISTRICT COURT ERRED REVERSIBLY IN REFUSING CITY'S REQUESTED INSTRUCTION ON § 1983 MUNICIPAL LIABILITY

V. WHETHER OR NOT SELECTION OF VENIRE FROM A HOLDOVER JURY POOL DISCRIMINATES OR VIOLATES THE EQUAL PROTECTION RIGHTS OF THE DEFENDANTS.

STATEMENT OF THE CASE

This case was initiated by the plaintiff's complaint filed October 2, 1992 which sought declaratory, injunctive and monetary relief from named defendants Arthur Deutcsh individually and in his capacity as chief of the City of Birmingham Police Department and the City of Birmingham. R1-1. Plaintiff invoked federal jurisdiction under 28 U.S.C.

§ 1343 seeking relief for an alleged constitutional rights violation through 42 U.S.C. § 1983. The complaint alleged that the defendants had violated plaintiff's constitutionally guaranteed right to free speech by punishing him for attending a public trial. R1-1-2.

On October 26, 1992 the defendants moved to dismiss the complaint on the ground that it was not supported by specific factual allegations. R1-5-1. Furthermore paragraph (3) of the motion to dismiss specifically pointed out the failure of plaintiff to allege that the City's liability was premised on an official policy, practice, or custom of the City of Birmingham as required by *Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018 (1978), which case was specifically cited in the motion to dismiss. R1-5-2. On November 24, 1992 the District Court, Judge William A. Acker entered an order dismissing the complaint for vagueness but plaintiff was given leave therein to amend the complaint within 10 days. R1-7.

On December 17, 1992 plaintiff filed his amended complaint which included an attachment outlining the disciplinary charges which had been brought against him by the Chief and the City. R1-10. The amended complaint was answered by defendants on January 12, 1993. The amended complaint alleged that Deutcsh had acted to violate plaintiff's constitutional rights as a policy maker of the City of Birmingham. The defendants' answer to the complaint specifically denied the material averments of this allegation in the complaint. R1-11-2

The district court entered its scheduling order in this case on January 13, 1993. On April 20 1993 a pretrial conference was held which was attended by the court and counsel for all

parties. Pursuant to the conference the district court on April 20, 1993 issued a pretrial order. R1-17. Therein the plaintiff again asserted that defendant Deutcsh was a policy maker for the City of Birmingham. R1-17-2. The defendants once again denied each and every material allegation of the plaintiff's complaint. R1-17-2. In so doing the defendants denied that part of the complaint and the pretrial position of plaintiff which sought to establish the required allegation (and subsequent required proof) of a municipal policy or a decision by a municipal policy maker. The very same day the defendants filed a summary judgment motion which claimed that plaintiff failed to allege (and thereafter prove) a policy or practice of the City which could cause the City to be liable under 42 U.S.C. § 1983. R1-18-1. The motion also claimed that Deutcsh was entitled to judgment in his favor individually under principles of qualified immunity.

On April 21, 1993 the district court issued a Rule 56 submission order. R1-19. On August 20, 1993 the district court denied the defendants' motion for summary judgment, filing with the denial order a memorandum opinion. R2-50. Between April 21, and August 20, 1993 there were several orders entered by the district court related to discovery. These matters were referred to the United States Magistrate Judge, Paul W. Greene. The Magistrate Judge entered orders accordingly and these were complied with by the parties.

On August 24, 1993 Deutcsh through his counsel filed notice of an interlocutory appeal pursuant to 28 U.S.C. § 1292 to the United States Court of Appeal for the Eleventh Circuit as to the denial of the summary judgment insofar as it claimed that he was entitled to judgment in his favor based upon the defense of qualified immunity. R2-51. On October 19, 1994

the Court of Appeals reversed the district court's judgment on the qualified immunity issue, finding that the facts of plaintiff's lack of preparedness were undisputed and that it was objectively reasonable to discipline him. R2-55. On February 16, 1995 the district court issued an order pursuant to the Court of Appeals mandate dismissing Deutcsh from the case in his individual capacity. R2-56.

On February 27, 1995 the defendants filed a second motion for summary judgment based on the argument that the language of the Court of Appeals established as undisputed fact that Morro was unprepared for Court and that therefore no unconstitutional policy could be proven since it is not unconstitutional to discipline an employee for violation of reasonable employment rules. R2-57. On March 23, 1995 the district court denied the second summary judgment motion and entered a memorandum opinion that same date. R2-61. The district court cited in its order that *Owens v. Fulton County,* 877 F.2d 947 (11th Cir. 1984) and *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915 (1988), offered "legitimate ways around *Monell*" .

A second pretrial conference was held on April 5, 1995. A second pretrial order was entered by the district court on the same date. R2-63. In the new pretrial order Johnnie Johnson, Jr. was substituted as defendant in his official capacity as police chief for the retired Chief Deutcah. R2-63-2. Plaintiff adopted all of its positions as stated in its complaint. R2-63-2. Defendants again took the position of denying every material averment in the complaint. R2-63-2. This denial again went to the plaintiff's claim in paragraph 9 of his complaint that Deutcsh was a final policy maker sufficient to impose liability on the City for his actions in disciplining plaintiff.

Appendix A

On April 11, 1995 defendants moved the district court for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). R2-64. The district court granted the certification by order entered on April 12, 1995. On June 2, 1995 the Court of Appeals granted permission for the appeal. On July 25, 1995 clerk of the Court of Appeals notified all parties that this second appeal had been dismissed for failure to prosecute. R2-66 and R2-67.

The case was called to trial before Judge Acker and a jury on March 18, 1996. The jury drawn from this case were not members of the pool officially called to service for the week of trial beginning March 18, 1996 but were the remainders from the previous two weeks of service and consisted of eighteen white venirepersons. R2-80-19. Defendant's challenged the venire before selecting from it. R2-88. The district court denied the challenge to the jury venire as well as denying challenges to two jurors who indicated they had strong feelings apparently negative toward the defendants in this case. R2-88.

During the trial defendant's raised objections to the admission of evidence which were overruled by the district court. R3-88. Defendants objected to the admission of a memorandum submitted by a personnel board hearing officer on the grounds that its probative value was clearly outweighed by its potential for prejudice and misleading the jury. The defendants also attempted to put on direct evidence that the plaintiff intentionally made himself unavailable to testify in Judge Carole Smitherman's municipal courtroom in order to register a protest of the way she had decided a particular case. The district court refused to allow this witness to testify. R3-88. At the close of the plaintiff's case in chief and at the close of all the evidence defendants' counsel made motions for

judgment as a matter of law pursuant to Rule 50 of the F.R.Civ.P. R3-88- and R3-88- All of these were denied by the district court. R3-88 and R3-88-.

Defendant and plaintiff submitted requested jury charges. R2-75 and R2-76. Defendants' lead counsel withdrew its requested charge on municipal liability because it was inconsistent as written with the law which should have been applied in the case. Counsel instead asked the court to give a standard charge on municipal liability which the district court refused to do. R3-88-.

On March 20, 1996 the case was submitted to the jury after the district court's instructions. That same day the jury returned a verdict against the defendants in the amount of $150,000. R2-77. The district court on March 21, 1996 entered judgment on the jury verdict. Pursuant to the consent of all parties Chief Johnnie Johnson, in his official capacity as police chief, was dismissed from the action. R2-78.

On March 29, 1996 the City of Birmingham filed a renewed Rule 50 motion and for alternative relief therein requested a new trial. R2-80. The motion stated as grounds for relief, *inter alia,* that the plaintiff failed to establish that Chief Deutcsh was a policy maker whose edicts and decisions could impose liability on the City of Birmingham under *Monell, supra, Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed. 2d. 452 (1986); *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed. 2d. 107 (1988); *Manor Healthcare Corp. v. Lomelo,* 929 F.2d 633 (11th Cir. 1991); *Martinez v. City of Opa-Locka, Florida,* 971 F.2d 708 (11th Cir. 1992); *Hill v. Clifton,* 74 F.3d 1150, (11th Cir. 1996). Attached to the motion were appendices with copies of state law, the rules and

regulations of the Jefferson County Personnel Board and local ordinances. R2-80 (appendices). On April 12, 1996 the district court denied the renewed Rule 50 motion (R2-80) and filed that same date a memorandum opinion in support of its ruling. R2-83. On April 17, 1996 the district court filed an addendum to its April 12, 1996 opinion. R2-84.

On May 2, 1996 the City of Birmingham filed the instant appeal of the district court's denial of its renewed Rule 50 motion or its alternative requested relief of a new trial to the United States Court of Appeal for the Eleventh Circuit. R2-86.

STATEMENT OF FACTS

Scott Thomas Morro has been a City of Birmingham Police officer since 1986 (R3-88-106). From the beginning of his employment as a policeman he has always been assigned patrol duties. In 1990 Morro was assigned to the police department's South Precinct. He worked the 11:00 p.m. to 7:00 a.m. shift. Part of his patrol beat included the Kingston Housing Project.

On June 3, 1990 Morro, while patrolling the Kingston area, encountered a man named Moses Payne. Payne was a black man of very small stature. At the time of his encounter with Morro he was 25 years old and four feet and five inches tall. Morro placed Payne under arrest after he refused the officer's orders to stop being disorderly. In attempting to arrest Payne, Morro first exited his patrol vehicle and informed Payne he was under arrest. Morro then seized Payne's wrist which the arrestee tried to pull away. Although Morro could keep a grip on Payne he could not completely control him. Morro's arrest report noted that Payne struggle with him and attempted to flee. It also noted that the "officer restrained the def. until cuffs

could be placed on him." (plaintiff's exhibit 15) The report also indicated that Morro had to use force to affect the arrest.

Morro's patrol partner that night was a less experienced officer named Rodney Hall. During the same encounter Hall arrested a man named Benjamin Franklin. Both men were able to arrested by the lone officer listed on the arrest reports. In writing the two separate arrest reports the officers, Hall and Morro, cross-referenced the other defendant as an accomplice in the offense of the other. (Plaintiff's exhibits 15, and 16).

Both Morro and Hall testified that back-up had to be called during the arrests. The nature of the back-up was of the highest priority. The arrests were notable also in the fact that other citizens moved close to the officers as they attempted to effect the arrests. Indeed one reason Ben Franklin was arrested was because he seemed bent on interfering in the arrest of Moses Payne.

When the case against Moses Payne was called to court he plead guilty and was punished by the Municipal Court. Ben Franklin demanded a trial, making it necessary for the prosecutor, Patricia Burns to issue subpoenas to the witnessing officers. Since the arrests reports cross-referenced accomplices both Hall and Morro were subpoenaed to testify.

Prior to the date the Franklin prosecution was to take place the daughter of Mayor Richard Arrington, Jr., Erica Arrington, had been arrested in a July 4 celebration. The arresting officer, Jerry Bahakel, accused Ms. Arrington of several offenses including inciting a riot. Ms. Arrington accused him of false arrest and excessive force. Ms. Arrington's trial took place over the course of two days, a friday night and a rare Saturday session

of Birmingham Municipal Court. Her trial was presided over by the Hon. Carole Smitherman, municipal judge. This trial was widely attended by the press and interested citizens. Among those attending were a number of South Precinct officers who were there apparently to show their support for Officer Bahakel. Among the South Precinct officers attending was Scott Morro. Morro did not attend the entire trial but sat behind Erica Arrington from about 30 minutes to an hour before leaving the trial. He did not return for any later part of the trial either that first night or the next day.

After the two day trial Judge Smitherman found Erica Arrington not guilty of all the charges against her. There was no Sunday session of municipal court and the very next court docket for Judge Smitherman was that Monday and it included the Ben Franklin case, in which Morro was a subpoenaed witness.

On the day of the Franklin trial, Prosecutor Burns sought to interview Morro in preparation for trial. Morro indicated that he could not remember anything about the arrest of Ben Franklin. Moses Payne and Franklin were seated in the municipal court together. Prosecutor Burns asked Morro to look into the courtroom to see if he recognized anyone. He indicated that he could not. After concluding from the information given her by Morro, that he could be of no assistance in the prosecution, Burns dismissed Morro. Officer Hall was also subpoenaed and provided the testimony necessary to gain Franklin's conviction in municipal court.

For some period after the Arrington acquittal Judge Smitherman noticed that there were increasing instances of forgetfulness and in attendance among the officers who were

called to testify in her court about arrests they had made. R3-88-355.

Judge Smitherman also testified that Morro was an officer who fairly frequently testified in her courtroom and who prior to the Erica Arrington trial had excellent recall, testifying without notes and exhibiting excellent memory. R3-88-356. Indeed, a review of this matter submitted to Morro and his counsel by the City attorneys showed that being unprepared is highly unusual for City of Birmingham officers. No officers other than Morro and Lockhart were ever complained of, investigated or disciplined for being unprepared for court. Plaintiff's exhibit No.13.

Judge Smitherman became so concerned about this phenomenon that she required one officer Betty Lockhart, to testify under oath that she could not remember the facts of a DUI arrest that included an accident and which occurred only a short time before the officer was called upon to testify. Later on Judge Smitherman complained to the police department about the drop in attendance and participation among officers subpoenaed to her court. She also gave statements to the internal affairs division of the department regarding the situation.

The internal division assigned Lt. Lee Ann Self to investigate the complaints from the municipal court. She interviewed a number of persons including Morro, Judge Smitherman, Prosecutor Burns and Rodney Hall. After her investigation, which included probing into the question of whether the drop off in participation was an intentional response or protest of Judge Smitherman's ruling in Erica Arrington's favor, she recommended that Morro be disciplined for a violation of departmental rules. Morro was not charged with anything but being unprepared for court. Morro's lack of preparation violated existing rules of the police department.

Appendix A

A hearing was held for Morro on the charges internal affairs had recommended against him. It was presided over by Deutcsh and participated in by his deputy chiefs. According to Chief Johnnie Johnson, who was then a deputy chief, the facts and issues at the hearing were discussed among the officials there and they made recommendations to Chief Deutcsh. Johnson testified that he was in agreement with the conclusion reached by internal affairs that Morro was unprepared for court. R3-88-424.

Johnson also provided testimony on the appeal process in place for disciplinary actions involving City of Birmingham police officers and other employees. Any decision on discipline made by a department head is appealable to the Mayor of the City of Birmingham. If the discipline imposed exceeds a five day suspension the employee is entitled to appeal the case to the Jefferson County Personnel Board. Johnson testified that the Personnel Board can and often does countermand the decisions made by the City of Birmingham police chief. R3-88-419.

After the hearing at the City Chief Deutcsh imposed discipline of a 30 day suspension on Morro. Morro exercised his right to appeal the decision of Chief Deutcsh. This right of appeal of the decision of Chief Deutcah was established by the law of the State of Alabama and by the rules and regulations of the Jefferson County Personnel Board. The Personnel Board assigned a hearing officer, attorney Ann Arnold, to hear the case against Morro. After hearing all the evidence she recommended to the board that the discipline against Morro be rescinded, apparently concluding that he was not unprepared for court as charged by the internal affairs division. Her conclusions from the evidence were made in a report to the

Personnel Board which was admitted into evidence over the City's objection. Plaintiff's exhibit No. 10. Upon her recommendation the Personnel Board took the action of rescinding the discipline that had been decided upon by Chief Deutcsh and Morro was reinstated with backpay for the time he had been suspended.

After his reinstatement, Morro returned to work in the South Precinct. He was under the command of Lt. Self who had left internal affairs to become a shift commander at South Precinct. Morro testified at trial that he continued to be harassed. His only proof of this however was his subjective interpretations of the assignments and instructions he was given by superiors with whom he disagreed with.

Prior to the Erica Arrington and Franklin trials there had been accusations against the Chief of Police, Arthur Deutcah, that he had tampered with or ordered the alteration of Erica Arrington's arrest records. In response to these accusations Chief Deutcsh on July 9, 1990 issued a memorandum explaining his version of the facts to members of the department. Morro was permitted to enter this memorandum into evidence as plaintiff's exhibit one over the objection of the defendants. Plaintiff's Exhibit No. 1.

During the trial of this case, a witness notified Lt. Self that he had heard Morro state that he would not testify in Judge Smitherman's courtroom because she did not believe the testimony of police officers. This statement was made contemporaneously with the judge's acquittal of Erica Arrington and the subsequent drop off in attendance of her court by subpoenaed police officers. When counsel for the City found out about the witness they notified the Court and counsel for

Morro. The City sought to introduce the testimony of this witness, officer John Crane, but were denied the opportunity to do so by the Court. R3-88-379.

SUMMARY OF ARGUMENT

Morro failed to adduce evidence in the district court that the deprivation he claimed the City was liable for was caused or occurred pursuant to a municipal policy as required for the imposition of municipal liability by *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030 (11th Cir. 1987). In particular, the evidence clearly, precisely and without controversy showed that former Birmingham Police Chief Arthur Deutcsh was not and could not, as a matter of law, be found to be a policy maker for the City of Birmingham on disciplinary matters under the holdings of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Alabama and the law of the State of Alabama which those holdings aforementioned require the Court to look to in determining who is a policy maker (including any local ordinances or regulations which are applicable. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633 (11th Cir. 1991); *Martinez v. City of Opa-Locka, Florida*, 971 F.2d 708 (11th Cir. 1992); *Hill v. Clifton*, 74 F.3d 1150. The evidence in this case clearly, precisely and without controversy showed that the personnel disciplinary decisions of the Chief of the Birmingham Police Department (both Chief Deutcsh and Chief Johnson) were subject to review by the Jefferson County Personnel Board and in some cases by the Mayor of the City of Birmingham.

Appendix A

Morro adduced no substantial evidence from which a reasonable jury could find that any violation or deprivation of his First Amendment rights occurred. If Chief Deutcsh punished only those officers who have been clearly demonstrated to have broken departmental rules and regulations for which they were clearly subject to discipline and to have punished no other officers there is no support for an inference by a reasonable jury that Deutcsh punished Morro for his association with or support of another officer. Since Morro was clearly unprepared and such lack of preparation is a violation of rules he cannot state that he was being punished for associating with or supporting another officer. This is particularly compelling given that no other officers who attended the trial were punished. And the only ones punished were those who had violated trial preparation rules. The only reasonable inference to be drawn from this scenario is that officers who violate court preparation rules will be punished. There was no evidence available to support an inference that officers will be punished for violating court preparation rules only if they support persons unpopular with the administration. This is so in part because no one else was ever accused of failing to prepared for courtroom participation in a case for which they made the arrest and were under subpoena.

The system employed by the Northern District of Alabama for empaneling juries violates the Jury Selection and Service Act, 28 U.S.C. § 1861, *et seq.* by causing the systematic underrepresentation of African-Americans in its venires. The selection of the jury venire in the instant case from the remaining available jurors on the March 4, 1996 Jury List rather than the larger (and usual) March 18, 1996 Jury List operated to cause absolutely no representation of African-Americans on the venire from which the Jury in the instant case was selected.

The City was substantially prejudiced by the district court's ruling admitting into evidence the report of the hearing officer. Although arguably relevant, the report's admission in its entirety resulted in unfair prejudice, confusion of issues (the issue was what was reasonable for Deutcsh, not what Ann Arnold thought about the evidence when she heard it) and misleading the jury (who may have thought that Ann Arnold's findings conclusively showed that Deutcsh could have had no reasonable basis and proper motive in disciplining the plaintiff). Federal Rules of Evidence, Rule 403.

The City was substantially and unfairly prejudiced by the failure of the district court to instruct the Jury on the basis of municipal liability under 42 U.S.C. § 1983. The district court's instructions to the Jury seem to indicate that the basis of municipal liability is the legal doctrine of *respondeat superior,* this doctrine cannot be the basis of municipal liability in a § 1983 case. *Jett v. Dallas Independent School District,* 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).

ARGUMENT

I. WHETHER THE DISCIPLINARY DECISIONS OF A CITY OF BIRMINGHAM POLICE CHIEF ARE FINAL DECISIONS WHICH MAY SUBJECT THE CITY TO LIABILITY UNDER *MONELL v. DEPARTMENT OF SOCIAL SERVICES*

Plaintiff failed to adduce evidence that the deprivation he claimed the City was liable for was caused or occurred pursuant to a municipal policy as required for the imposition of municipal liability by *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Sideman v. Shallowford Community Hospital, Inc.,*

826 F.2d 1030 (11th Cir. 1987). In particular, the evidence clearly, precisely and without controversy showed that former Birmingham Police Chief Arthur Deutcah was not and could not, as a matter of law, be found to be a policy maker for the City of Birmingham on disciplinary matters under the holdings of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Alabama and the law of the State of Alabama which those holdings aforementioned require the Court to look to in determining who is a policy maker (including any local ordinances or regulations which are applicable. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Manor Healthcare Corp. v. Lomelo,* 929 F.2d 633 (11th Cir. 1991); *Martinez v. City of Opa-Locka, Florida,* 971 F.2d 708 (11th Cir. 1992); *Hill v. Clifton,* 74 F.3d 1150, (11th Cir. 1996); See Appendices containing Act No.248, H.580, of the Alabama Legislature of 1945 p. 376 as amended (the Jefferson County Personnel Board Enabling Act), The Jefferson County Personnel Board Rules and Regulations, Act No. 452 of the Alabama Legislature of 1955, as amended (excerpts from the Mayor-Council Act- establishing the form of government adopted by the citizens of the City of Birmingham), Supplemental Personnel Rules and regulations adopted by the City of Birmingham.

The evidence in the district court clearly, precisely and without controversy showed that the personnel disciplinary decisions of the Chief of the Birmingham Police Department (both Chief Deutcsh and Chief Johnson) were subject to review by the Jefferson County Personnel Board and in some cases by the Mayor of the City of Birmingham.

Appendix A

In *Monell v. Department of Social Services, supra,* the United States Supreme court held that section 1983 liability may not be based upon *respondeat superior* theory alone. This holding was reaffirmed in *Jett v. Dallas Independent School District,* 491 U.S. 701, 736 (1989). These Court rulings hold that municipalities are liable only when the alleged constitutional violations result from the official policies and well-settled customs of the municipalities. These holdings are in part based on the notion that municipal governments can act only through natural persons. The governments should only be held responsible when, and only when, their official policies caused their employees to violate the plaintiff's constitutional rights. The vicarious liability implicit in the *respondeat superior* doctrine is inconsistent with the causation requirement implicit in the language and legislative history of 42 U.S.C. section 1983. Thus the statement often quoted from *Monell*:

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edict or acts *may fairly be said to represent official policy*, inflicts the injury that the government as an entity is responsible under Section 1983.

Monell, 436 U.S. at 694. (emphasis in original)

Since the decision in *Monell,* the Supreme court has ruled in a several cases that municipal liability under § 1983 can arise from a single decision taken by municipal officers responsible for setting policy in a precise area of the government's activities. *See Praprotnik,* 485 U.S. at 123; *Pembaur,* 475 U.S. at 480 (1986). In *Pembaur* the Court found municipal liability for the violation of the plaintiff's Fourth Amendment rights where deputy sheriffs unlawfully entered the plaintiff's office on the

express instructions of the county prosecutor. The Eleventh Circuit analyzed *Pembaur's* impact in the municipal or governmental liability area in section 1983 litigation in *Manor Healthcare Corp. v. Lomelo,* 929 F.2d 633 (11th Cir. 1991),

> In *Pembaur,* the Court articulated the following three-part test for determining when a single act of a municipal officer subjects the municipality to liability under section 1983: (1) acts which the municipality officially sanctioned or ordered; (2) acts of municipal officers with *final policy-making authority as defined by state law*; and (3) actions taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area. *Pembaur,* 475 U.S. at 480-3 & n.12, 106 S.Ct. at 1298-1300 & n. 12. The Court also clarified the fact that a *municipality is not liable merely because the official who inflicted the constitutional injury had the final authority to act on its behalf.* Thus the Court states:
>
> [W]e hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to section 1983 liability. Municipal liability attaches *only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered.* The fact that a particular official- even a policy making official — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. *See, e.g. Oklahoma v. Tuttle,* 471 U.S. [808] at 822-24 105 S.Ct, [2427] at 2435-2436 [85

> L.Ed.2d 791 (1985)]. The official *must also be responsible for establishing final government policy respecting such* activity before the municipality can be held liable.
>
> *Pembaur,* 475 U.S. at 481-82, 106 S.Ct. at 1299-1300. *See also City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Jett v. Dallas Independent School Dist.* 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989). (emphasis added).

Manor Healthcare, 929 F.2d at 637.

In *Praprotnik,* the Court further clarified when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. There the Court held that the municipality could not be held liable for the unconstitutional transfer of a city employee where the officials who arranged for the transfer did not possess final policy making authority with respect to employment decisions and had not been delegated such authority. The Eleventh Circuit in following *Praprotnik's* conclusions in the case of *Mandel v. Doe,* 888 F.2d 783 (11th Cir. 1989) articulated the former's conclusions as follows:

> The Court concluded that the mere delegation of authority to a subordinate to exercise discretion is not sufficient to give the subordinate policy making authority. Rather, the delegation must be such that the subordinate's discretionary decisions are not constrained by official policies *and are not subject to review. Praprotnik,* 485 U.S. at 125-28 (Emphasis added).

Mandel, 888 F.2d at 792.

Appendix A

The *Praprotnik* plurality stated that a policy maker's review of a subordinate's decisions does not reflect municipal policy maker's review of a subordinate's decisions does not reflect municipal policy and thereby create municipal liability.

> Simply going along with discretionary decisions made by one's subordinates . . . is not a delegation to them of the authority to make police.
>
> * * *
>
> It would be a different matter if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policy maker. It would also be a different matter if a series of decisions by a subordinate official manifested a "custom or usage" of which the supervisor must have been aware. In both those cases, the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official. But the failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority . . .

Praprotnik 485 U.S. at 130.

The *Praprotnik* plurality also reached the important conclusion that whether a particular official has "final policymaking authority" is a question of state law. *Praprotnik*, 485 U.S. at 124.

Appendix A

> "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority *is a question of state law.* (Emphasis added).

Id. at 124 (quoting *Pembaur,* 475 U.S. at 483).

In *Jett v. Dallas Independent School District,* 491 U. S. 701 (1989), a majority of the Supreme Court adopted the *Praprotnik* plurality's view that identification of the official or final policy maker is a question of state law.

> [T]he identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury. Reviewing the relevant legal materials, including state and local positive law, as well " 'custom or usage' having the force of law," *Praprotnik, supra,* at 124 n. 1, 108 S. Ct., at 924, n. 1, the trial judge must identify those officials, or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have cause the deprivation of rights at issue by policies which affirmatively command that it occur, *see Monell,* 436 U. S., at 661, n. 2, 98

> S. Ct., at 2020, n. 2, or by acquiescence in a longstanding practice or custom which constitutes the "standard operating procedure" of the local governmental entity. *See Pembaur, supra,* at 485-487, 106 S. Ct., at 1301-1302 WHITE, J. concurring).

Jett, 491 U. S. at 737.

In *Manor Health,* the Eleventh Circuit held a city could not be held liable under § 1983 for the mayor's alleged bribery and extortion in connection with a zoning matter, as the mayor was not the ultimate policymaking authority regarding zoning issues, and the city neither adopted nor ratified his bribery and extortion. *Manor Health,* 929 F. 2d at 636-38. The court concluded that under city charter, granting the mayor the power to oversee and administer all departments and agencies of the city, including the planning and zoning departments, the city council was granted the power to override the mayor's veto with regard to zoning matters. *supra.* at 637. Therefore, the mayor was not the ultimate policymaking authority regarding zoning issues. The court further concluded that the city did not develop a custom or practice which allowed the mayor to function without any supervision or review regarding zoning.

The City contends that there was no municipal policy or custom which deprived plaintiff of any constitutional right. The City contends that pursuant to *Rules and Regulations — The Personnel Board of Jefferson County* ("*Rules and Regulations*") (appendix) the Personnel Board, not the Mayor or the police chief, has final policy making authority with regard to adverse personnel actions taken against City employees. Nor did Morro demonstrate a custom or practice of the City whereby the City has taken adverse employment actions against persons similarly situated to him.

Appendix A

It is undisputed that the *Rules and Regulations* provide an extensive review and appeals procedure for disciplinary actions taken against "classified employees." Police officers of the City of Birmingham are in the "classified service" and are, therefore, covered by the *Rules and Regulations*. (See rules 1.10(a),(b)). Rule 6 provides:

> 6.1 DISCIPLINARY POLICY . . . A permanent employee may be dismissed, demoted, or suspended for cause or for any other reason deemed to be in the best interest of the public service and shall have the right of appeal as set forth in the following provisions.
>
> 6.5 APPEAL An employee with permanent status shall have the right appeal disciplinary action of dismissal, demotion, or suspension . . .
>
> 6.6 HEARING. The board shall order a public hearing of such charges. The hearing shall be for the purpose of determining whether or not the employee, by reason of his act or acts as charged and his record of service, merits retention in the service or should be removed therefrom or otherwise disciplined . . . The hearing may be before the Board or a Hearing Officer appointed by the Board. . . . If the Personnel Board hears such charges, it shall make its own opinion and decision.
>
> 6.8 DECISION . . . The board may rescind, modify or increase the penalty imposed by the appointing authority as warranted by the facts adduced at the hearing.

Appendix A

> 6.12 JUDICIAL REVIEW. The decision of the Board based upon all proceedings before the Board shall be final, subject to appeal by either party to the Circuit Court to review questions of law and the question of whether or not the decision or order of the Board is supported a substantial and legal evidence.

Rules and Regulations. The City also points the court to Rule 10.1 of the *Rules and Regulations* which the City contends sets forth the Board's policy with respect to employment with the City.

> 10.1 ACTIVITIES PROHIBITED. No person shall be appointed or promoted to, or dismissed from any position, or in any way favored or discriminated against with respect to employment because of his sex, political or religious opinions or affiliations, or his race.

The evidence suggests that Chief Deutcah was the official who made the initial decisions as to dismissal, demotion and suspension of police officers. The disciplined police officer may then appeal Chief Deutcah's decision first to Mayor Arrington, and then to the Personnel Board pursuant to Rule 6. (City Supplemental Personnel Rules, appendix). The facts are undisputed that plaintiff did appeal his suspension or termination to the Personnel Board.

There is no support for the district court's conclusion that Deutcsh is the final policy maker for the City with regard to police department personnel and disciplinary decisions. A proper consideration of state law and the applicable *Rules and*

Regulations, as well as the custom and practices of the City, lead to the conclusion that the Jefferson County Personnel Board is the final policymaker with regard to these decisions. First of all, Rule 6 of the *Rules and Regulations* clearly states that decisions of Deutcsh are reviewable by the Board. *Praprotnik, Worsham,* and *Manor Health* all held that a city official is not the final policymaker when that official's decisions are subject to review procedures. *See also Payung v. Williamson,* 747 F. Supp. 705, 708-09 (M.D.Ga. 1990) (Mayor was not the final policymaker for city in connection with personnel matters because all of mayor's employment decisions were subject to review by entire city council. As opposed to *Worsham, Manor Health and Payung* in which the City Council reviewed personnel decision, *Praprotnik* involved a reviewing body most analogous to the Jefferson County personnel Board, the reviewing body in *Praprotnik* was an *independent, non-internal* Civil Service Commission empowered to review and correct improper personnel actions. The Commission was created pursuant to the St. Louis City Charter. *Praprotnik,* 485 U. S. at 130. The Supreme Court in *Jett* stated that the final policymaker may be identified in either state or local law. *Jett,* 491 U. S. at 737. There is no evidence in this case proving that the Board's review is ineffective and meaningless. In fact the Personnel Board reversed Deutcsh's decision and reinstated the plaintiff with back pay for the period he was suspended.

II. WHETHER THERE WAS INSUFFICIENT PROOF THAT PLAINTIFF SUFFERED A CONSTITUTIONAL DEPRIVATION.

Obviously, there is a clearly established constitutional right to attend a public trial. An off-duty police officer may attend such, on his personal time when his attendance does not conflict

with his duties. This was also shown to be the City's policy. Morro did not prove that the disciplinary action taken against him was in retaliation for his exercise of his First Amendment right to attend a public trial. Morro did not prove that his exercise of this protected right was a motivating factor at all. Morro alleged that his discipline for his admitted unpreparedness was a "pretext". Morro's proof consisted of the chronology of events, from the arrest of the Mayor's daughter, his short-lasting attendance at her trial, his then admittedly (albeit, grudgingly) being unprepared for the trial of one (1) of the two earlier-arrested defendants, the investigation of his conduct of being unprepared and his subsequent suspension. Morro proved only that he attended a public trial and he was disciplined thereafter. However, the City proved that the discipline came following an investigation of Morro's being unprepared for a later trial before the same judge who acquitted the Mayor's daughter. That decision was not well-received by Morro.

Morro's proof is merely his subjective opinion that the discipline was pretext. Morro offered, as direct evidence of proof of retaliation, a letter the City's counsel submitted relating to a "poll" of Birmingham Police Department commands as to whether anyone else had been disciplined for "unpreparedness". Plaintiff's Exhibit No. 1. This exhibit does not offer any proof of retaliation or proof of a pretext for same. Morro's opinion also does not provide any help in determining the issue, let alone evidence. The City offered consistent and substantial legal evidence that the discipline was due to Morro's memory problem, not retaliation.

Morro's suspension occurred following an investigation of a similar, but later incident with the same judge, not involving Morro. Officer Betty Lockhart exhibited a similar unexplained

"memory loss" during another trial before Judge Smitherman. Morro's name came up as a possible prior case. During the internal investigation of Morro, it was proved to the reasonable satisfaction of the investigator and Deutcsh that Morro was at least unprepared for court. Indeed, the City's evidence possibly showed that Morro was retaliating against the City Judge, not Deutcsh or the City against him. The issue being in doubt, Morro was not charged nor disciplined for it.

Morro failed to prove a "causal connection" that his attendance at the trial resulted in his suspension. All that Morro proved was that his suspension occurred after the date attended the trial; that he was unprepared to assist in a different trial; and that one (1) other Police Officer had been disciplined for similar conduct. The "direct evidence" of retaliation comes only from Morro's strained interpretation of counsel's letter to the trial judge. No others had ever been complained-of, so no others were ever investigated or disciplined. This does not establish proof of a constitutional violation against Morro. Morro offered no proof that the City or Deutcsh unlawfully considered his attendance at the trial of the Mayor's daughter.

Morro does not have a constitutional right to avoid a properly-motivated investigation for being unprepared to perform his job. *Burns v. Reed,* 111 S.Ct. 1934 (1991). There was no evidence that the investigation commenced due to Morro's attendance at the trial. There was also no evidence that any later shift-assignment, supervision, evaluations or other personnel actions (including referring plaintiff to a psychiatrist) was commenced or motivated due to Morro's attendance at the trial, or for any other unlawful reason. Morro does not have a constitutional right to avoid discipline for being unprepared to perform his job. Part of Morro's duties include recalling and

truthfully testifying to the details of an arrest incident. Such a constitutional right does not exist, nor is it so "clearly established" that the defendants could be found liable were they to be in violation.

A government official may act within the realm of his discretionary authority. *Rich v. Dollar,* 841 F.2d 1558 (11th Cir. 1988). In granting Deutcsh qualified immunity for his "official" acts, the 11th Circuit found that Deutcsh had the discretionary authority to discipline Morro for being "unprepared for court". This Court ruled that as the evidence arguably showed Morro was in fact unprepared, Deutcsh was "objectively reasonable" in deciding to discipline him. *Morro v. City, et al.* (docket number 93-6738, 11th Cir., 5/15/95 opinion). Morro appears to believe that the fact that the Personnel Board disagreed with the City that his conduct merited a 30-day suspension is proof of the existence of constitutional violation. Morro may wish that is the state of the law, but it is not. If the law is unclear at the time the cause of action arose or if a reasonable officer could have believed his actions were lawful in light of clearly established law and the information he possessed, he is not liable. *McDaniel v. Woodward,* 886 F.2d 311 (11th Cir. 1989); *James v. City of Douglas, Ga.*, 941 F.2d 1539 (11th Cir. 1991). There is no "bright line standard" to evaluate when discipline violates clearly established constitutional rights. *Dartland v. Metropolitan Dade County,* 866 F.2d 1321 (11th Cir. 1989). If Morro's position is upheld, then one may avoid deserved-discipline merely by exercising some constitutional right prior to the date of the disciplinary action. Supervisors will be incapable of issuing discipline, or conducting investigations of rules infractions. The law does not support such a conclusion. Supervisors merely have to be reasonable, not right in their personnel decisions.

Appendix A

III. ADMITTING THE PERSONNEL BOARD HEARING OFFICER'S REPORT INTO EVIDENCE WAS REVERSIBLE ERROR.

The District Judge admitted, over defendants' objections, the Report of the Personnel Board Hearing Officer. Plaintiff's exhibit number 10. This report contains-the reasons the *Hearing Officer* found to support her recommendation to rescind Morro's 30-day disciplinary suspension. The report is merely a recommendation and the Personnel Board is not bound by this recommendation, nor the reasons given supporting such. In this case, the Personnel Board did adopt the recommendation to rescind Morro's suspension. However, there is no proof that it also adopted the Hearing Officer's rationale. Assuming arguendo, as there was no evidence that such was the case, the Personnel Board accepted the Hearing Officer's rationale, still nothing relevant is proven thereby. All that is proven is that both the Hearing Officer and Personnel Board disagreed with the defendants' decision to discipline Morro. Placing the report into evidence allows the jury to decide by speculation not evidence, that an unlawful reason existed for the disciplinary action and thus generated the rescission of the suspension.

A supervisor need not be completely right. A supervisor is even allowed to be completely wrong. For purposes of this lawsuit however, it must be proven further that the supervisor's wrong decision was based on a violation of Morro's "clearly established statutory or constitutional rights of which a reasonable person would have known". *Anderson v. Creighton,* 483 U.S. 635 (1987); *Courson v. McMillian*, 939 F.2d 1479 (11th Cir. 1991). This exhibit does not prove, nor does it tend to prove, anything other than that the Hearing Officer and Personnel Board disagreed with Deutcsh's decision and

overturned it. There is no ruling that they found Deutcsh motivated by an unconstitutional reason. Admitting this exhibit into evidence allows the jury to unfairly speculate that the Personnel Board's disagreement with Deutcsh's decision to discipline equates with such proof.

IV. WHETHER THE DISTRICT COURT ERRED REVERSIBLY IN REFUSING CITY'S REQUESTED INSTRUCTION ON § 1983 MUNICIPAL LIABILITY

Jury instructions are intended to give jurors an understanding of the law so that they can properly discharge their duty as finders of fact.

In this the City objected to the jury instructions given by the court on record before the jury retired, Pursuant to Federal Rules of Civil Procedure Rule 51, stating that the court failed to give a general 1983 liability standard for municipalities as a result of a policy and that the constitutional deprivation has to be caused by the policy and that the policy has to be set forth by a policymaker.

In *Praprotnik v. St. Louis,* 108 S.Ct. 915 (1988), it is stated that the Civil Service Commission had final decision making authority regarding employee termination and transfers, while the agency heads at most were entrusted with the authority for making discretionary personnel decisions in their departments. In this case Justice O'Connor stated that "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it. And certainly there can be no justification for giving a jury the discretion to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself."

Appendix A

In *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), it is stressed that not every decision by municipal officers subjects municipalities to § 1983 liability. Rather municipal liability attaches only where the decisionmaker posses final authority to establish municipal policy with respect to the action ordered. Mere authority to exercise discretion is not enough.

Monell v. Department of Social Services, 436 U.S. 658 (1978), states that once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether their decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur.

In Federal Jury Practice and Instructions Vol.3 §103.11, it gives an example of instructions on a liability standard for municipalities which states as follows:

> Plaintiff claims that the city of ____, a municipality, is liable to him for the constitutional deprivation that he alleges. You are instructed that the city of ____ may be liable where you find that plaintiff has been deprived of his constitutional rights and such deprivation was done pursuant to a governmental custom, policy, ordinance, regulation or decision. When the plaintiff is injured as a result of a government's policy, custom, regulation or decision, whether made by its lawmakers or by those officials whose edicts or acts may fairly be said to represent official policy, the city itself is responsible for the injury that it caused.

A failure to give explicit instructions to the jury regarding municipal liability and constitutional deprivation deprives the

jury of their duty as finders of fact. It is clear that there was no municipal policy or custom which deprived plaintiff of any constitutional right. Pursuant to the Rules and Regulations of the Jefferson County Personnel Board final policymaking authority with regard to adverse personnel actions taken against city employees are exclusively the decisions of the Jefferson County Personnel Board and not the Mayor nor the Police Chief.

V. WHETHER OR NOT SELECTION OF VENIRE FROM A HOLDOVER JURY POOL DISCRIMINATES OR VIOLATES THE EQUAL PROTECTION RIGHTS OF THE DEFENDANTS.

In Jury selection the controlling case is *Batson v. Kentucky,* 106 S.Ct 1712 (1986), and its progeny. Racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial jury intended to secure. In this case the court allowed the venire to consist of whites only selected from a jury wheel empaneled on March 4, 1996, which had served its two week term as jurors, and a new pool of jurors empaneled on March 18, 1996 was available to select a venire from.

The City, as a defendant, has the right to be tried by a jury whose members are selected pursuant to non discriminatory criteria. *Martin v. Texas,* 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906). The criteria employed by the court in itself is facially nondiscriminatory, however, the deviation from the criteria allowing a holdover venire when a fresh pool of jurors is available, and the holdover venire lacked the racial diversity of the community, is suspect. The City concedes that statically it is possible for it to receive an all white venire. The probability of receiving an all white petit jury is exponentially

increased when the pool has undergone several petit jury selections and the African-American representation has diminished due to their selection for petit juries. There can be no representation without representatives.

EQUAL PROTECTION

To establish an equal protection violation in the jury selection context, a defendant must show:

(1) That he or she is a member of a group capable of being singled out for discriminatory treatment.

(2) That members of this group were substantially under-represented on the venire.

(3) That the venire was selected under a practice providing an opportunity for discrimination. *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991).

Although the prima facie case for an equal protection claim resembles the elements of a fair cross section claim, the purpose of an equal protection claim is to determine whether the disparity in the jury venire is the result of a discriminatory purpose. Whereas the inquiry in a fair cross section claim focuses on the representativeness of the jury venire, the focus of an equal protection claim is whether members of a discrete group have been intentionally denied the opportunity to serve on a jury.

According to the 1990 U.S. Census Data the defendant, "The City", has a total population of 265,968. Out of the total population, 165,277 (63%) are African-American, 95,655 (36%) are white, and 2,036 (1%) are of other race. Whether at

common law or under the statutory law of jury selection it is agreeded that juries are to be drawn form a cross section of the community. The term "community" was defined in *U.S. v. Grisham*, 63 F.3d 1074 (11th Cir. 1995) in which is expounded that neither the language of the vicinage provision nor is legislative history suggest the geographical area from which the jury is summoned must be smaller than the judicial district created by Congress. Accordingly, the district court did not err in concluding that, in this case, the relevant statistical community was the Northern District rather that the Southern Division. Mapping the language onto the Northern District it is proper to say that the Jury Pool is the Northern District. With the majority of the City's citizens being African-American it is reasonable for the court to conclude that the City is predominately African-American, is a member of a group capable of being singled out for discriminatory treatment.

The City racial makeup was substantially underrepresented in the venire. The relevant statistical community is the Northern District. The Northern district is divided into seven Statutory divisions. 28 U.S.C. § 81(a). Pursuant to the plans, which were adopted by all of the judges of the United Stated District Court for the Northern District and approved by a panel of the judicial council of the United States Court of Appeals for the Eleventh Circuit, the district courts selects juries on a district-wide basis, as opposed to a division-wide basis. The percentage of percentage of population of Northern district eligible for jury service that is African-American is about 18%. The percentage of African-Americans on the venire was 0%. If the absolute disparity between the two percentages is 10 percent or less, the second element is not satisfied. *United States v. Rodriguez*, 776 F.2d 1509, (11th Cir. 1985). In the instant case the difference is approximately 18 percent which far exceeded the 10 percent

minimal set out in *Rodriguez*. The substantial underrepresentation on the venire alone is probable through statistical calculation but when coupled with the problem inherent in using a holdover venire amounts to stacking the deck against the City assuring that African-American participation on venire is minimal at best violated Equal Protection under the Fourteenth Amendment. Conclusively, there can be no representation when there are no representatives.

The final element that must be proved whether the venire was selected under a practice providing an opportunity for discrimination. The venire was empaneled on March 4, 1996. The defendant trial started on March 18, 1996, at which time a fresh panel of jurors was available to select from. The venire use had been available for previous trials over its two week tenure. Several petit jury were selected from the venire diminishing the representation of African-Americans on the venire. When the holdover venire reached the defendant trial the African-American representation was zero. No African-Americans were on the venire. The practice of discretionally using "holdover" venire when a fresh pool is available provides an opportunity for discrimination. A court knowingly using a holdover venire, knowing that the African-American representation was likely diminished, knew or should have known that its practice provided an opportunity for discrimination.

The City's motion to strike the venire should have been granted. The Equal protection Clause of the Fourteenth Amendment focuses on whether members of a discrete group have been intentionally denied the opportunity to serve on a jury. Using a holdover venire which is not composed of members of a group have been singled out for discriminatory treatment,

that members of the group were substantially underrepresented and the venire was selected under a practice providing an opportunity for discriminating make out a prima facie case and establishes an Equal Protection violation.

CONCLUSION

Because the district court should have found that the decision of Chief Deutcsh in disciplining Morro was not a final decision of the City of Birmingham and under the law of the State of Alabama was subject to meaningful review on appeal to the Jefferson County Personnel Board, thereby affording no basis for the imposition of municipal liability under *Monell v. Department of Social Services,* its judgment is due to be reversed and the district court ordered to enter judgment in favor of the City of Birmingham. The City is alternatively entitled to judgment because Morro failed to establish by substantial evidence any constitutional injury or deprivation for which he was entitled to relief.

Alternatively, the City of Birmingham is entitled to a new trial because of prejudicial errors of the district court in admitting evidence which was irrelevant, confusing and mi<leading. The City is alternatively entitled to a new trial because of prejudicial error of the district court in not allowing the testimony of a witness who would have testified that Morro intentionally avoided testimony in the municipal court.

Furthermore the City is alternatively entitled to a new trial because of a violation of equal protection in the jury selection process as well as the failure of the district court to remove from the jury two jurors who were likely to be prejudiced or biased against the City as indicated by their response to voir dire questions.

Appendix A

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OCTOBER TERM, 1997

CITY OF BIRMINGHAM, ALABAMA,
Petitioner,
v.
SCOTT THOMAS MORRO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner City of Birmingham, Alabama, respectfully submits this reply to the Brief in Opposition of Respondent Morro. Morro's arguments should not dissuade this Court from granting review; indeed, having received those arguments this Court is now in a proper position to reverse the judgment below without further ado.

I. THE QUESTIONS PRESENTED IN THE PETITION ARE PROPERLY BEFORE THIS COURT, AND THEY MERIT REVIEW.

Morro's primary argument is an attempt to hide the merits of this case behind not one, but two, layers of avoidance; not only does he say that the City waived the *Monell* issue, but also he says that the City waived the right even to contend that it did not waive the issue. This argument is unavailing. This Court would have the authority to review the issues presented here even if they had

not been presented at all below and had not been decided by the Court of Appeals. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). But exercise of jurisdiction in this case would involve no stretch at all; the issue of whether the City waived the *Monell* issue was the subject of extensive discussion in oral argument before the Court of Appeals, was *the* basis on which the Court of Appeals decided the case, and was again extensively discussed by the City in petition for rehearing by the Court of Appeals. The issue is properly before this Court.

Morro's second approach is that this case involves a mere discretionary exercise of trial court authority to narrow the issues in pretrial proceedings. But the trial court would have had discretion to penalize the City for not raising the *Monell* issue in the pretrial order only *if* it was the City's—rather than Morro's—duty to preserve the issue in that form. In other words, as shown in the Petition, the decision below would be justifiable *only* if the *Monell* issue is a "defense" rather than an element of plaintiff's claim. That question—i.e., whether the *Monell* issue is a "defense" such that it was waived by the City—is the primary one presented by the Petition; and Morro's mere disagreement with the City's argument does not weigh against review.

Morro's third effort is to misdirect this Court's attention, arguing that the City waived the *Monell* issue by its conduct during the trial. That is *not* what the Court of Appeals held; instead, the Court of Appeals held that the City had waived the issue by not specifically noting it in the pretrial order. [Appendix A to Petition, 13a-15a]. And, though Morro fails to acknowledge it, at trial the District Court specifically *allowed* the City to raise the *Monell* issue as a supplemental ground for its Rule 50 motion, without apparent objection by Morro. [Appendix D to Petition, 83a-84a (District Court: "I'm not faulting you for not having articulated it sooner . . . Let's renew or allow you to reimpose the 50(a) motion in light of the argument that Chief Deutcsh was not the final deci-

sion maker and therefore was not the City of Birmingham")]. Thus the questions presented in the Petition—rather than some intensive review of what occurred at trial—are the core of this case.

II. MORRO'S ARGUMENTS ON THE SUBSTANTIVE ISSUE OF MUNICIPAL LIABILITY ARE WITHOUT MERIT.

Finally, Morro contends that the City is liable under *Monell* for the disciplinary suspension of which he complains. The City briefly responds to this issue, so that this Court will be in a better position to grant review and decide this case without further briefing.

The unalterable fact, which requires rejection of Morro's argument, is that under applicable state and local law there is a Personnel Board which sits in review of such suspensions; indeed, it is undisputed that the Personnel Board reversed Morro's suspension and made him whole for all lost pay. [Appendix A to Petition, 4a]. Under these circumstances, where the Personnel Board can and does review decisions by the lower-level officials who impose such discipline, it is clear under this Court's precedent that the lower-level officials (whose decisions are reviewed and reviewable) are *not* "final policymakers" whose decisions will subject the municipality to liability. *See, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (plurality opinion).

Morro may be suggesting that the Personnel Board could not be the City's final policymaking authority—and instead that the City is liable for the decisions of lower officials, even when those decisions are (as here) reversed by the Personnel Board—because the Personnel Board is not purely a part of the City of Birmingham but instead is empowered to review decisions by other municipalities as well. This is immaterial; it does not detract from the dispositive fact that, under state and local law, the Personnel Board has the authority to set final policy for the City of Birmingham in such matters. This Court has rec-

ognized that, in determining where final municipal policymaking authority lies, the federal courts should respect the right of state and local governments to structure their own affairs. *Praprotnik*, 485 U.S. at 126 ("[A] federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it"). This is so, even though the Court recognized at the same time that states distribute such authority in a "rich variety" of ways. *Id.*, 485 U.S. at 124-25. Under that rule, the Personnel Board must be respected as the final policymaking authority for the City with regard to this suspension, even though the Personnel Board also has such authority with respect to some other municipalities.[1]

Morro's second argument seems to be that the Personnel Board cannot be the City's final policymaking authority with regard to his suspension because the Personnel Board's review did not precede the effective date of the suspension. This is merely an attempt to confuse the *Monell* issue of municipal liability with a flawed bit of due process theory, as though a municipality was required to offer a pre-deprivation hearing in order to avoid *respondeat superior* liability. Unsurprisingly, Morro offers no support for this novel theory. Indeed, the due process clause does not even always entitle public employees to a hearing prior to being suspended. *Gilbert v. Homar*, 117 S.Ct. 1807 (1997). Certainly then, § 1983 (which is not itself a source of individual rights) does not of its own force require municipalities to provide pre-deprivation hearings in order to avoid being held vicariously liable for the reviewable decisions of lower-level employees.

Morro's third argument seems to be that he was unfairly precluded from showing a municipal "custom" through evidence of an alleged pattern of behavior by the City's former Chief of Police. However, no number of

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[1] The District Court quoted applicable provisions of state law which give the Personnel Board the authority to review suspensions like Morro's. [Appendix B to Petition, 40a].

witnesses could have overcome the fact that Morro's suspension was *reversed* by the Personnel Board, which has final authority over such matters; this shows conclusively that the suspension was *not* the act of the City itself. Furthermore, Morro never raised any "custom" claim in his Complaint or in any pretrial order, but instead relied only on the "final policymaker" route to municipal liability. Thus this case is governed by the Court's recognition that the "final policymaker" issue is one of law, *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989), and that federal courts are "not . . . justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Praprotnik*, 485 U.S. at 126.

In short, Morro's suspension—which was *reversed* by the entity with final policymaking authority over such matters—was not the act of the City itself. Therefore the City cannot be liable under § 1983.

CONCLUSION

For the reasons stated herein, Petitioner respectfully submits that a writ of certiorari should be granted to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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